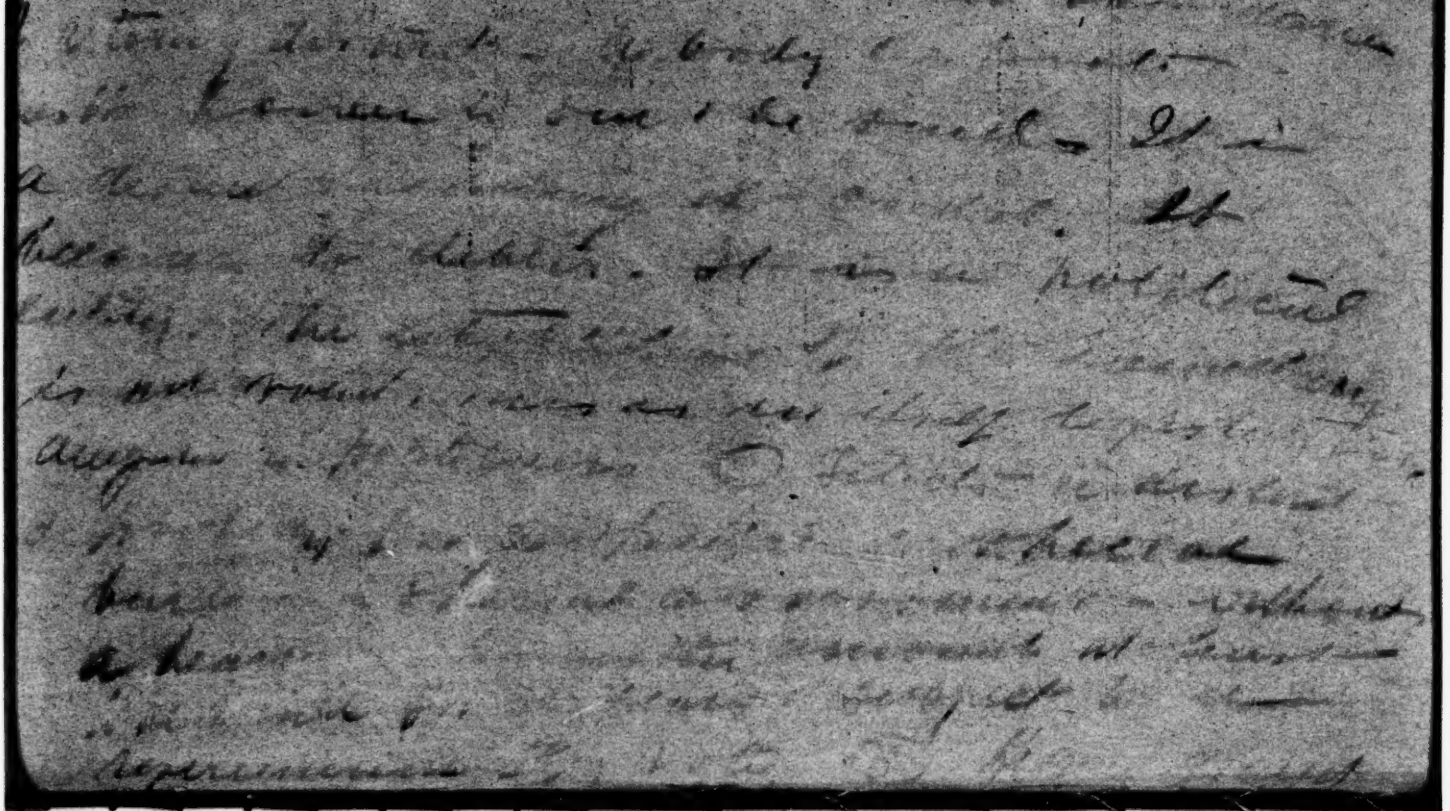
TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

No. [illegible]



(30,830)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 256

PERRY BROWNING, WM. COLEMAN, JAMES E. DALE, ET AL., APPELLANTS,

vs.

E. M. HOOPER, E. A. McDONALD, E. L. BISHOP, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS

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[fol. 1] **IN UNITED STATES DISTRICT COURT**

No. 161, Equity

PERRY BROWNING et al., Complainants,

vs.

E. M. HOOPER et al., Defendants

CAPTION

Said action was commenced on the 6th day of May, 1924, and proceeded to trial and final disposition at the time and place aforesaid, and during the progress thereof the following proceedings were had, in the order and at the times herein stated, to-wit:

[fol. 2] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS

BILL OF COMPLAINT—Filed May 6, 1924

Now comes Perry Browning, J. T. S. Gant, G. W. Edgin, Wm. Coleman and James E. Dale, hereinafter called the complainants, complaining of E. M. Hooper, E. E. McDonald, E. L. Bishop, E. A. Herndon, Henry Munchrath, C. S. Morris and C. E. Goodwin, hereinafter called the defendants, and for their cause of action against the defendants allege and would show unto the Court as follows, to-wit:

I

The complainants and the defendants are each and all citizens and inhabitants of the State of Texas, and of this district and division thereof. The complainants, Perry Browning, J. T. S. Gant, Wm. Coleman and James E. Dale are residents and inhabitants of the County of Wichita in the State of Texas, this district and division. The complainant, G. W. Edgin, and all of the defendants are residents and inhabitants of the County of Archer, in the State of Texas, in this district and division. The defendant, E. M. Hooper is the duly elected, qualified and acting County Judge of Archer County, Texas. The defendants, E. A. McDonald, Henry Munchrath, D. L. Bishop and E. A. Herndon, are the duly elected, qualified and acting County Commissioners of Archer County, Texas. The defendant, C. S. Morris, is the duly elected, qualified and acting County Tax Assessor of Archer County, Texas, and the defendant, C. E Goodwin, is the duly elected, qualified and acting Sheriff and [fol. 3] Tax Collector of Archer County, Texas. The Hon. W. A. Keeling is the Attorney General of Texas, and the Honorable Pat M. Neff is Governor of Texas, and this may be served with notice at Austin in the Austin Division of the Western District of Texas.

II

This suit is of a civil nature in equity, the matter in controversy exceeds, exclusive of interest and cost, the sum or value of Three Thousand ($3,000.00) Dollars, and arises under the constitution of the United States. The complainants as the owners of both real and personal property situated in the political subdivision of Archer County, Texas, known as road district No. 2, of Archer County, Texas, bring this suit against the defendants for the purpose of enjoining the levy, assessment and collection of a special road district assessment of said Road District No. 2, upon the grounds, (a) that the manner of creation of said road district and levy of such tax upon the property of the complainants and, (b) the Statute under which said tax was levied and assessed is violative of Section 1, of the 14th Amendment to the Constitution of the United States, securing to the complainants due process and equal protection of the laws, all as hereinafter set forth and alleged.

Wherefore, from the nature of the matter as will hereinafter appear, the complainants having no adequate remedy at law, represent that this Court has jurisdiction to hear and determine the issues arising upon the fact hereinafter related.

III

The complainant, Perry Browning, is the owner of the following described taxable real property in Archer County, Texas, to-wit:

[fol. 4] Sect. 11, Blk. 1, H. & T. C. R. R. Abst. 219; the N. Half of Blk. 1, Blk. 2, Blk. 3, Blk. 6, Blk. 7, Blk. 8, (except the S. portion of Blk. 8, in the name of Mrs. M. Berger), Blk. 9, (except a strip off the N. end in the name of J. L. Jackson), and Blk. 10, all out of the German Emigration Company Lands in said County, and containing 2,400 acres and all lying within the limits of said Road District No. 2.

The complainant, J. T. S. Gant, is the owner of the following described taxable real property in Archer County, Texas, to-wit:

300 acres known as abstract 1173 in the name of J. T. S. Gant, immediately adjoining the South boundary line of S. W. ¼ of H. & T. C. R. R. Co. Survey No. 4, Abst. 906.

The complainant, Wm. Coleman, is the owner of 14,000 acres known as Lots Nos. 1 to 68, of the Brazos County School Lands, Abst. 18, Blks. 49 & 50, of D. L. & G. Co. Survey, Abst. 931, Blks. 51 to 54 of the L. Pennington Survey, Abst. 258, and Blks. 55 to 59 inclusive, of the A. Castleberry Survey, Abst. 57; also Surveys 74, 79, 80 & 81, of the American Tribune New Colony Company Subdivision in Archer County, Texas.

The complainant, James E. Dale, is the principal owner of the following described land, comprising about 8,200 acres in said county to-wit: Blks. 1, 2, 3, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 32, 33, 34, 35, 36 & 37 of Ward and Housels Subdivision of the Brazos County School Land, and Block 4, H. & T. C. R. R. Survey, Abst. 906.

The complainant, G. W. Edgin, as well as the other complainants, are the owners of certain taxable personal property in said county, [fol. 5] consisting of horses, cows, farm implements, etc. That the total valuation of the real property owned by the complainants as assessed for taxation by the defendants herein is $132,390.00; that the total valuation of the personal property belonging to the complainants as assessed for taxation by the defendants for general purposes is $24,510.00, a total of $156,900.00. The complainants by rason of the location of their property (East of the Wichita Falls and Southern Railway Company tracks and North of the Wichita River in said County) are each interested in the same manner and to the same extent in the subject matter of this suit and the cause is a common one to them and each of them in the same respects and particulars all as will more fully appear from reference to the facts hereinafter related.

IV

Heretofore, to-wit, on the 14th day of January, 1924, a petition for the creation of a road district to be known as Road District No. 2, in Archer County, Texas, was filed in the County Commissioners' Court of Archer County, Texas, by L. L. Hudson and seventy-three other persons alleged therein to be resident property tax paying voters thereof, wherein it was prayed by the petitioners that a certain territory or district of said county comprising generally the N. W. ¼ of the County and the N. E. ¼ thereof, excepting that portion of the N. E. ¼, South of the little Wichita River, the district as set forth and described in said petition being specifically described in the order entered on said petition on said date, and it was further prayed in said petition that an election be called in said district for the purpose of determining whether or not the bonds of said district in the principal sum of $250,000.00 to bear a rate of interest to be fixed by the Com- [fol. 6] missioners' Court not exceeding 5½% per annum and for the levying of tax upon all of the taxable property in the district subject to taxation, for the purpose of paying the interest on said bonds, which it is provided shall be paid semi-annually and to create a sinking fund for the redemption of said bonds at maturity.

Thereafter on the same date, said petition coming on for hearing before the Court, an order was entered recognizing said Road District No. 2, of Archer County, Texas, by the defendants herein and calling an election to be held in said Road District No. 2, in accordance with the prayer of said petition as hereinbefore set forth.

Thereafter, on the 17th day of January, 1924, the order last above mentioned was vacared by further order of said Commissioners' Court and a new petition was filed for the creation of said Road District No. 2, in all respects the same as the petition therefor that had been filed on the 14th day of January, excepting that the amount of bonds that should be voted upon in the election to be called thereunder was increased from $250,000.00 to $300,000.00. Upon said petition another order bearing said date and in all respects the same as the order entered on the 14th day of January, excepting as to the amount of bonds to be issued which was changed from $250,000.00

to $300,000.00, was entered by the contestees; a copy of said petition and order being herewith attached, marked Exhibits B and C, respectively, to which reference is here made for further particularity. In said order the County Judge was directed to give notice of said election to be held on the 23rd day of February, 1924. At said election it was ordered that the propositions,—"whether or not the bonds of said Road District No. 2, of Archer County, Texas, shall be issued in the amount of $300,000.00, bearing interest at a rate to be fixed [fol. 7] by the Commissioners' Court of said County, not exceeding 5½% per annum, interest payable semi annually and maturing at such time or times as may be fixed by the Commissioners' Court, serially or otherwise, not exceeding thirty (30) years from the date thereof, for the purpose of constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof, and whether or not a tax shall be levied upon the property of said Road District No. 2, of Archer County, Texas, subject to taxation, for the purposes of paying the interest on said bonds and to provide a sinking fund for the redemption thereof at maturity", be submitted to the voters of said district. It was further ordered by the Court that said election be held under the provisions of Art. 627 to 641 inclusive, of Chapter 2, Title 18, Revised Statutes 1911, as amended by Sect. 1, Chap. 203, Acts of 1917, Legislative Regular Session. In said order the following voting precincts and presiding officers of the election was designated:

"At Tom Hart's Grocery Store, in the Wilcox Building, in voting precinct N. E. Archer City No. 1, with W. O. Covington as Presiding Officer.

"At the Holliday School House in the town of Holliday, in voting precinct Holliday No. 2, with J. A. Howard as Presiding Officer.

"At the Bowman School House in voting precinct Bowman No. 2, with R. A. Crowell as Presiding Officer.

"At the Liberty School House in Voting Precinct Liberty No. 4, with O. F. Ashbrook as Presiding Officer.

"At the Lake Creek School House in voting Precinct Lake Creek No. 5, with Will Henderson as Presiding Officer.

"At the Baxter School House in voting precinct Baxter No. 11, [fol. 8] with J. H. Whittaker as Presiding Officer.

"At the Dundee School House in the town of Dundee in Voting Precinct Dundee No. 12, with J. D. Smyth as Presiding Officer.

"At the Geraldine School House in Voting Precinct Geraldine No. 13, with Geo. Parrish as Presiding Officer.

"At the office of the Archer Realty Company, in the town of Archer City, in Voting Precinct N. W. Archer City No. 23, with W. L. Andrews as Presiding Officer."

Thereafter, and on the 23rd day of February, 1924, and election was held in said district pursuant to said order and notice and on the 28th day of February, 1924, the defendants herein officially declared the results of said election in favor of the issuance of said bonds, and at the same time announced the following vote had been polled in the respective precincts designated in said notice, to-wit:

Voting precinct	For	Against
Geraldine	5	0
Baxter	2	13
N. E. Archer City	24	2
Liberty	11	12
Lake Creek	1	42
Dundee	140	15
Bowman	32	5
Holliday	51	7
N. W. Archer City	37	6
Total	303	102

It is further recited in said order "that the proposition to issue said bonds and levy said tax was sustained by two-thirds majority [fol. 9] of the qualified property tax payers voting at said election and that the Commissioners' Court of said County is authorized to issue said bonds and to levy and have assessed and collected said taxes.

In pursuance of said order so declaring the result of said election, the defendants thereafter and on the same date entered their order authorizing the issuance of said bonds which order is recorded in the minutes of the County Commissioners' Court of Archer County, Texas, and is here referred to for further particularity. The fact of filing the petition for said election of the order of the Court calling the same, of the notice of the election for four weeks prior thereto, of the holding of the election, of the canvassing of the returns, and of the result of the election in favor of the bonds is recited and was thereupon ordered by the Court that the bonds so voted, be issued by the Court, the order providing in detail for the execution, form and details thereof, and it is further provided and ordered therein that a direct annual tax be levied, assessed and collected in due form and manner and at the time other County taxes are levied, assessed and collected, in each year, upon all taxable property in said Road District No. 2, of Archer County, Texas, to pay the interest on said bonds as it accrues and to provide a sinking fund for the redemption thereof at maturity, a copy of said orders are hereto attached, marked Exhibit D, and here referred to. Said order specially provides for the levy assessment and collection of a direct ad valorem tax upon the property of said District for the year 1924, of 43¢ per $100.00 valuation of the taxable property of the District.

V

The foregoing proceedings were had in a purported compliance [fol. 10] with the provisions and under the authority of Section 52, of Article 3, of the Constitution of Texas, whereby it is provided that under Legislative provisions any defined district to be defined and described within the State of Texas, and which may or may not include towns, villages or municipal corporations, upon a vote of a two-thirds majority of the resident property tax payers voting

thereon who are qualified electors of said district to be affected thereby, may issue bonds in any amount not to exceed one-fourth of the assessed valuation of the real property of such district for the construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof, and under the provisions of Chap. 2, Title 18, of the Revised Laws of Texas, as contained in Vernon's Complete Statutes, 1920, Art. 627, to 641 inclusive, wherein it is provided among other things that any defined district in the State is authorized to issue bonds in any amount not to exceed one-fourth of the assessed valuation of the real property of the County and to levy and collect taxes to pay the interest upon such bonds and provide a sinking fund for the redemption thereof for the purpose of constructing, maintaining, and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof. That upon petition of a majority of the resident property tax paying voters of any defined district to the County Commissioners' Court of the County, in which said district is situated, the Court shall have power and it shall be its duty at any session thereof to order an election to be held in such district to determine whether or not the bonds of such district shall be issued in any amount not to exceed one-fourth of the assessed valuation of the real property thereof for the purpose of constructing, maintaining and operating macadamized, graveled or paved roads or turnpikes, or in aid thereof, and that there shall also be submitted to such resident property tax [fol. 11] paying voters, the question whether tax shall be levied upon the district for the purpose of paying the interest on said bonfs and to provide a sinking fund for the redemption thereof; that the amount of bonds proposed to be issued and the rate of interest and date of maturity shall be stated in the order for said election and in the notice thereof; that the order for the election and the notice therefor shall define the district as described and defined in the order establishing the same; that notice of the election shall be given by publication for four weeks; that the election shall be governed by the general laws of the state not in conflict with the provisions of said Chapter; that if the election is known to the Commissioners' Court to have carried by a two-thirds majority, the bonds shall be issued as soon thereafter as practicable on the credit of such district; that the bonds shall mature not later than thirty years after date or serially; that they may not bear more than 5½% interest; that they shall be examined and approved by the Attorney General of Texas and registered by the Comptroller of Public Accounts; before the sale thereof. That before the bonds may be put on the market a tax shall be levied sufficient to pay the interest thereon and to produce a sinking fund to pay the same at maturity; that such tax shall be assessed and collected in the same manner as provided by law for the assessment and collection of common school district special local taxes; that the same shall be levied by the Commissioners' Court; that the tax collector and assessor of the County shall assess and collect the same in the same manner and at the same time as other taxes and shall be paid over to the County Treasurer to the credit of the district, payment on the bonds to be made by the

Treasurer: that the district shall be numbered definitely and bear the name of the County in which located and that upon accepting the provisions of said article such district should thereupon become [fol. 12] a body corporate, capable of suing and being sued in like manner as counties.

It is further provided in Sec. 637-D, of said Chapter 2, Title 18, that when a defined Road District of a county has been established and issued bonds no defined Road District shall thereafter be created or established overlapping the same territory or embracing any part thereof while any of the bonds of such defined Road District are outstanding and unpaid.

The common school district special local taxes mentioned in Chapter 2, Title 18, aforesaid are provided for in Chapter 15, Title 48, of the Revised Statutes of Texas, Articles 2837 to 2836, Vernon's Complete Texas Statutes 1920, it is provided therein that taxes for such purposes shall be assessed at the rate of value of property as such property is assessed for State and County purposes. The tax is to be levied by the County Commissioners' Court and assessed and collected by the County Tax Assessor and Collector under the general laws and at the same time as other taxes are assessed and collected. A copy of the statutes above referred to are hereto attached, marked Exhibit E, and referred to.

VI

Archer County is about thirty miles square. The County seat, Archer City, is a short distance East of the center of the County. In the Northwestern portion of the County lie the towns or villages of Dundee, Mankins and Holliday. In the Northeast quarter of the County, and especially all of that portion of the county lying North and East of Archer City, there are no towns or villages whatsoever. There is a community known as the Lake Creek Community, in which there are several families and property owners and on the Wichita Falls and Southern Railroad, there are two stations, Huff [fol. 13] and Luke Wilson. At Luke Wilson there is no settlement. At Huff, a very small settlement. In the main the real property in the Northeast portion of the County is owned by non-residents, a considerable portion thereof by one G. H. White, another considerable portion thereof by L. F. Wilson, another considerable portion thereof by Wm. Coleman, and aforesaid 2,400 acres by the complainant, Perry Browning. In fact, in the Northeast quarter of the County there are only about 51 resident property tax paying voters. The townsite of Geraldine has a population of about 100, of whom 63 are resident property tax paying voters. The town of Holliday has a population of 200, of whom 141 are resident property tax paying voters. The towns of Dundee and Mankins have a population of about 350, of whom 267 are resident property tax paying voters.

That portion of Archer City, the county seat, lying in said Road District No. 2, has a population of about 225, of whom 170 are residents property tax paying voters. The Ozark Trail connects the City of Wichita Falls, Texas, and the aforesaid Holliday, Mankins

and Dundee in the Northwestern portion of Archer County. The Southwest trail connects the City of Wichita Falls with the County seat, Archer City, through the central portion of the County. In the Eastern portion of the County in the vicinity of the complainant's land, the City of Wichita Falls is connected through Archer County by what is known as the old Meredian Highway, an unimproved dirt road which has been in use for over forty years. It is sometimes called the Jacksboro Road and is a short cut between Wichita Falls and Fort Worth. There are no railroads in the vicinity of the complainants' land but Archer City, Dundee, Mankins and Holliday have railroads connecting them respectively with Wichita Falls, in [fol. 14] Wichita County, Texas, and with the counties and territory adjoining Archer County on the West and South. This is apparent from the map of the County hereto attached and which is referred to. It will be seen therefore that there are comparatively no resident property tax paying voters in the eastern portion of the County, North of the Wichita River in said district, for a distance of about eight miles toward the center of the County, who can possibly have any voice in the determination of the questions submitted to the property tax paying voters of said Road District No. 2, as hereinbefore alleged. The roads in the eastern portion of the County and in the vicinity of the complainants' property and especially said old Meredian Highway traverses in many instances bottoms and creeks that in rainy weather are impassable. The property valuation in Road District No. 2, is largely made up of that portion of the property lying to the West of the tracks of the Wichita Falls and Southern Railway Company. The property of the complainants, and that property lying East of the Wichita Falls and Southern Railway tracks in said County, constitutes only a very small fractional part of the total valuation of said Road District, approximately one-35th thereof. The old Meredian Highway, in addition to serving the complainants and those residing east of the Wichita Southern tracks, serves that territory in said County and in Clay County, Texas, immediately adjoining south of the Wichita River, including the towns of Scotland and Windthorst in Archer County, that are likewise served by no railroads but depending entirely for their outlet upon the maintenance of said Meredian Highway. Of this, more will be said hereinafter in respect to the motives of the complainants in creating said Road District No. 2. The City of Wichita Falls lies directly north of that territory in Road District No. 2, east of Wichita Falls and Southern Railway and said City [fol. 15] constitutes and is the only national and practical market used by the inhabitants of the Eastern portion of Archer County and the Western portion of Clay County for marketing their produce. From two-thirds to three-fourths of the entire population of Road District No. 2, as attempted to be created by the complainants, reside in that portion of the County west of Wichita Falls and Southern Railway tracks. At the present time there is no communication and there possibly will never be any necessity whatever for any communication or system of Highways connecting that portion of Archer County East of said tracks with that portion of the County West

thereof. The County seat being readily accessible from said old Meredian Highway. In truth with the exception of said Meredian Highway and one or two roads running East directly from Archer City the greater part of said land is pasture or ranch land running through breaks, canyons and hills and is inaccessible to road building so that practically speaking, there is no relation whatever between the eastern portion and the Western portion of the County as demarked by said railway tracks.

For a considerable time prior to the filing of the petition for said road district, there had been great agitation throughout Archer County for the creation of road districts and the issuance of road district bonds for the purpose of improving the roads in the county. The agitation was fostered and the defendants were responsible for the primary plan thereof. It was the plan of the defendants to converge all primary roads in the county into the county seat at Archer City where the defendant Hooper resides and being the presiding officer of the County Commissioners' Court, he weilded his influence upon the other defendants to the end that his program be adopted. It was proposed in substance that the Ozark Trail connecting the Northwestern portion of the County through Dundee, Mankins and Holliday with Wichita County, be improved by the [fol. 16] issuance of bonds and construction of a permanent Highway. That a new road be opened between Archer City and the Southeast corner of the County to there connect with a Highway in the adjoining Jack County. That the territory in the Northeastern portion of the County hereinbefore mentioned be left entirely without road improvements. The Highway proposed to be established by the defendants are outlined on the hereto attached map in green, and in the order Exhibit A, which was entered when the petition for the district was presented. The establishment of such a system of Highways in the County and including these complainants' property and the property of others in the Eastern portion of the County East of the aforesaid railway tracks and East and North of Archer City, would be of no benefit whatever to the complainants or the other property owners in said territory, but the creation and establishment of any portion of such Eastern territory in a road district for the construction of Highways in conformity with the defendants' plan would result in the taxing of the complainants' property and the property of others similarly situated in the eastern portion of the county for the construction of such roads and thereupon they would never have any right, power or authority under the Statute of Texas hereinbefore referred to, to create a road district in the eastern portion of the county for the improvement of their roads, but would be compelled during the existence of any outstanding obligation upon the part of so inclusive a road district to pay taxes to construct, maintain and operate the defendants' proposed Highway system. In this connection, the complainants allege that the property valuations in said County exclusive of all that property therein East of the said [fol. 17] Wichita Southern tracks is more than sufficient to warrant

the creation of a road district or road districts for carrying out the proposed Highway system of the defendants without an undue tax burden upon the property owners therein. The plat of the County showing said districts and Highways is made Exhibit F, hereto.

VII

Pursuant to the election held in said district, the defendant E. M. Hooper and the defendants described as the County Commissioners of Archer County have entered an order of the Commissioners' Court of Archer County, Texas, levying a tax upon all of the taxable property of the complainants in said county, all of which is in said Road District No. 2, as hereinbefore alleged, for the purpose of paying the current interest on said $300,000.00 bond issue and to create a sinking fund for the redemption of said bonds at their maturity. That said tax is ordered to be assessed at the rate of 43¢ upon each One Hundred Dollars of all the taxable property of said district; that under the aforesaid laws if valid said tax thereupon became, was and is final and it merely remains for the defendants County Tax Assessor to apportion said tax upon the tax rolls of the County and assess same on the property of these complainants without respect to where the improvements contemplated in said Road District No. 2, are located and without respect to the benefit, if any, inuring to the property of the complainants by virtue of said assessment, but in the same manner as ad valorem taxes are assessed in said county for State and county purposes. The entry of said order, the assessment of said taxes by said court and by the tax assessor constitutes the same, if valid, a binding and subsisting lien upon the property of these complainants hereinbefore described, not only for the current interest and sinking fund of said bonds, but for the entire amount thereof in the proportion that the value of their prop-
[fol. 18] erty bears to the total values in the district.

VIII

In the creation of said Road District; the calling of the election therefor; the canvassing of the returns thereof; the issuance of the bonds of said district; in ordering the levy of said tax upon the property in said District; and especially the property of the complainants; in the levy of the tax; and in the assessment of the same upon said property, or at any other stage of said proceedings, no notice to the land or property owners in said district is authorized by said statute, under which the same was purported to be created; likewise no hearing is afforded the property owners in said district at any stage of the proceedings upon the question of the benefits of said proposed improvements to the complainants' property; that no hearing was had at any stage of said proceedings at which the land owners could be heard in the premises.

IX

That the defendants herein who comprise the County Commissioners' Court of Archer County with the exception of the defendant,

Henry Munchrath, entered into conspiracy with the voters in the Northwest portion of said County for the purpose of establishing said road District No. 2, including the property of the complainants and the other property East of said Railway tracks with full knowledge of the foregoing facts, and for the purpose only of raising revenue from the property of these complainants and others in said district similarly situated to construct said road without regard whatever to [fol. 19] the benefit the construction thereof would be to their property. That each and all of the steps hereinbefore detailed were taken in pursuance of said unlawful and arbitrary conspiracy upon the part of said defendants; that although the complainants protested to said Commissioners' Court that the inclusion of their property in said territory would result in an unjust and unconscionable taking of their property; said defendants wrongfully in pursuance of said conspiracy included said property in said district.

X

That the provision of the laws of Texas hereinbefore set out in authorizing the creation and establishment of said road district; the issuance of bonds thereof and the taxation of the complainants' property in the manner aforesaid, are violative of the first section of the Fourteenth Amendment to the Constitution of the United States, guaranteeing to the citizens of the United States the equal protection of laws and due process of law, especially as the same were applied and administered by the defendants herein in the circumstances of this case:

(a) In including the complainants' property in said district arbitrarily and capriciously, and for the purpose of raising revenue only.

(b) In authorizing and in creating said road district in the manner aforesaid without giving notice to and affording the complainants and others similarly situated, an opportunity to be heard upon the question of the benefit of the proposed improvement to their property.

(c) In authorizing the levy, assessment and collection of a tax for said special improvement upon the same basis as other property in said district is taxed without respect to the relative benefit the proposed improvement would be to the complainants' property.

[fol. 20] (d) In authorizing the levy, assessment and collection of a tax and in levying, assessing and in attempting to collect a tax upon the property of the complainants for the aforesaid purposes without, at any stage of the proceedings giving notice to and affording the complainants an opportunity to be heard upon the question of benefit and amount of tax levied, assessed and collected upon their property in the manner aforesaid.

(e) In permitting the creation of said district and in the creation of same, in the circumstances of this case, arbitarily without hearing and at the caprice and uncontrolled will of a prejudiced and interested few of the interest parties—and this without respect to the character and extent of their holdings.

(f) In permitting as in this case, the levy of a tax upon the prop-

erty of the complainants entirely disproportionate to the benefits conferred.

(g) In permitting the inclusion of the complainants' property, not for the purpose of improvement of it, or benefit to it, but for the sole and exclusive benefit of the property of the petitioners for said road district and others similarly situated.

XI

That the defendants, and each of them, purporting to act under the aforesaid law, are threatening to, and will unless enjoined by this Court, levy, assess and collect for the year 1924 and for the succeeding twenty-nine years, a tax upon all of the property of said district for the purpose of paying the interest and to create a sinking fund to pay off and discharge said indebtedness of said district at maturity. That unless enjoined by this Court, they will offer [fol. 21] for sale and sell the aforesaid bonds of said district so purported to be authorized under said laws, and will use the proceeds thereof for the construction, operation and maintenance of the Highways mentioned in the order of said Commissioners' Court, all to the great and irreparable injury of these complainants.

Wherefore, premises considered, these complainants pray the Court that a hearing be ordered hereon forthwith; that notice thereof be given to the defendants in such manner and form as the Court may direct; that at least five days' notice of such hearing be given the Governor and Attorney General of the State of Texes; that upon such hearing, a temporary injunction enjoining the defendants and each of them in the premises, from ordering the levy of and from levying, assessing and collecting the aforesaid taxes, or any part thereof for the year 1924, and for all subsequent years as contemplated in said bond proceedings; that they be temporarily enjoined from issuing, offering for sale or in any other manner disposing of said bonds, or any part thereof; that upon final hearing said injunction be made permanent; that they recover their costs, and that they have all such other and further relief in the premises to which they may be entitled in equity and good conscious, and the complainants will ever pray.

Wm. R. Watkins, Solicitors for the Complainants, Perry Browning, J. T. S. Gant, G. W. Edgin and Wm. Coleman.

[fol. 22] Sworn to by Wm. R. Watkins; jurat omitted in printing.

EXHIBIT "A" TO BILL OF COMPLAINT

THE STATE OF TEXAS,
County of Archer:

IN THE COMMISSIONERS' COURT OF ARCHER COUNTY, TEXAS

Now comes for the consideration of this Court the petition of L. L. Hudson and 73 other persons, all resident citizens and qualified

property taxpaying voters of *of* that certain territory described in said petition as proposed to be created as "Road District No. 2 of Archer County, Texas," for the purpose of holding an election in said proposed district to determine the issuance of $300,000.00 of bonds for the purpose of constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof; and

It Appearing to the Court that it is the desire of said petitioners that, in the event the purpose of said election receives the necessary two-thirds vote of the qualified voters at said election, then, it is their purpose and desire that the proceeds from the sale of said proposed bonds, or so much thereof as may be necessary, shall be [fol. 23] applied to the construction, maintenance and operation of the macadamized, graveled or paved roads and turnpikes, or in aid thereof, upon the following roads and highways within said proposed road district, to-wit:

"The Wichita Falls, Holliday, Dundee and Seymour Road" and now particularly known as the Ozark Trail; and

"The Archer City and Wichita Falls Road" and now particularly known as the Southwest Trail; and

A road six miles in length, extending from Dundee to what is known as the Diversion Dam of the Wichita Irrigation Project; and

A road six miles in lenth, extending from the town of Holliday to a point, in an easterly direction from the town of Holliday, to the road known as the "Wichita Falls and Archer City Road,"

And it further appearing that the desire of said petitioners represents the will of a large majority of the resident citizens and qualified voters of said proposed road district, and that it is their accepted belief and confidence that the proceeds from the sale of said proposed bonds, or so much thereof as may be necessary, will be expended in the construction of said roads as hereinbefore set out:

It is therefore, the order of this court, that, in the event this Court is authorized and does issue the said proposed bonds, that the proceeds thereof, or so much thereof as may be necessary, shall be expended for the benefit and for the purpose herinbefore mentioned upon behalf of and for the several roads and highways as set out above.

Passed and Signed in open Court.

E. M. Hooper, County Judge. E. A. McDonald, Commissioner Precinct No. 1. H. Munchrath, Commissioner Precinct No. 2. D. L. Bishop, Commissioner Precinct No. 3. E. A. Herndon, Commissioner Precinct No. 4.

[fol. 24] Recorded Minute Book F, pages 487-488 Commissioners' Court.

EXHIBIT "B" TO BILL OF COMPLAINT

Petition

THE STATE OF TEXAS,
County of Archer:

To the Honorable Commissioners' Court of Archer County, Texas:

We, the undersigned, being resident citizens within the hereinafter described territory situated in Archer County, Texas, respectfully represent:

1st. That we are resident qualified property taxpaying voters within said territory.

2nd. That we desire your honorable body to order an election to determine whether or not the bonds of said territory, to be known and designated as "Road District No. 2 of Archer County, Texas," shall be issued in the amount of $300,000.00, bearing interest at the rate to be fixed by the Commissioners' Court of said County not exceeding five and one-half (5½) per centum per annum, interest payable semi-annually, and maturing at such time or times as may be fixed by the Commissioners' Court, serially or otherwise, not to exceed thirty years from the date thereof, for the purpose of constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof; and whether or not a tax shall be levied upon the property of said proposed road district, [fol. 25] subject to taxation, for the purpose of paying the interest on said bonds and to provide a sinking fund for the redemption thereof at maturity.

3rd. That the territory which we pray your honorable body to designate as "Road District No. 2 of Archer County, Texas," is accurately described by metes and bounds, to-wit:

Beginning in said Archer County, Texas, at the center of the Court House of Archer County, Texas, in the town of Archer City, Texas;

Thence due west in a direct line to a point in the center of Center Street;

Thence in a southerly direction down the center of Center Street to a point where the same is intersected by the center of Walnut Street;

Then in a westerly direction with the center of Walnut Street to a point in the center of Walnut Street where the same intersects the west boundary line of the town of Archer City, Texas;

Thence in a southerly direction with the West boundary line of the town of Archer City, Texas, to a point where the same intersects the south boundary line of the West one-half of the Geo. W. Barnett Survey;

Thence in a westerly direction with the south boundary line of the said West one-half of the Geo. W. Barnett Survey to the southwest corner of same;

Thence continuing in the same direction along and with the south

boundary line of the G. W. Dugan preemption survey to the southwest corner of same in the east boundary line of the J. Nelson Survey;

Thence in a southerly direction along and with the east boundary [fol. 26] line of the J. Nelson survey to the southeast corner of same;

Thence in a westerly direction along and with *g*he south boundary line of the said J. Nelson Survey to the southwest corner of same, the same being in the east boundary line of the Mariana Hutchinson Survey:

Thence in a northerly direction along and with the east boundary line of the said Mariana Hutchinson Survey to the northeast corner of same;

Thence in a westerly direction along and with the North boundary line of the said Mariana Hutchinson Survey to the northwest corner of same, the same being in the east boundary line of block No. 109 of the Jno. W. Harris subdivision of the Club Ranch;

Thence in a northerly direction along and with the east boundary line of said Block 109 of the Jno. W. Harris Subdivision of the Club Ranch to the Northeast corner of same;

Thence in a westerly direction along and with the North boundary line of said Block 109 of said Harris subdivision to the northwest corner of the same, and continuing in the same direction along and with the north boundary line of block No. 108 of the said Harris subdivision to the northwest corner of said block 108;

Thence in a southerly direction along and with the west boundary line of said block 108 of said Harris sub-division to a point where the same is intersected by the northeast corner of block No. 97, of said Harris sub-division;

Thence in a westerly direction along and with the north boundary line of the said Block 97, of said Harris subdivision to the northwest corner of the same, and continuing in the same direction with [fol. 27] the north boundary line of block Nos. 98, 69, 63 and 56 of said Harris sub-division to the northwest corner of said Block No. 56 of said Harris sub-division, the same being the northeast corner of Block 49, of said Harris sub-division;

Thence in a southerly direction along and with the east boundary line of said Block 49, of said Harris sub-division to the southeast corner of same;

Thence in a westerly direction along and with the south boundary line of Block No. 49 to the southwest corner of said Block No. 49, and continuing in the same direction along and with the south boundary line of Block Nos. 36, 34, 22, 19 and 17 of said Harris subdivision to the southwest corner of said Block No. 17, of said Harris sub-division:

Thence in a northerly direction along and with the west boundary line of said Block No. 17 of said Harris sub-division to the northwest corner of same, the same being the southeast corner, of Block No. 2, of said Harris sub-division;

Thence in a westerly direction along and with the south boundary line of said Block No. 2 to the southwest corner of same, the same

being a point in the east boundary line of Dallas County School Land Survey;

Thence in a northerly direction along and with the east boundary line of said Dallas County School Land Survey to the northeast corner of same;

Thence in a westerly direction along and with the north boundary line of said Dallas County School Land Survey to a point where the same intersects the east line of the J. C. Phelan Survey, and continuing in the same direction along and with the north boundary line of the said J. C. Phelan Survey to the northwest corner of same;

[fol. 28] Thence in a westerly direction along and with the north boundary line of said Dallas County School Land Survey to the most northern northwest corner of same, the same being the northeast corner of the Benj. H. Mordecai Survey;

Thence in a southerly direction along and with the east boundary line of the said Benj. H. Mordecai Survey to the southeast corner of same;

Thence in a westerly direction along and with the south boundary line of the said Benj. H. Mordecai Survey to the southwest corner of same, the same being a point in the east boundary line of the Jno. M. Taylor Survey, No. 12;

Thence in a southerly direction along and with the east boundary line of the said Jno. M. Taylor Survey No. 12, to the southeast corner of same;

Thence in a westerly direction along and with the south boundary line of the said Jno. M. Taylor Survey No. 12, to the southwest corner of same, the same being a point in the east boundary line of the C. W. Buckley Survey;

Thence in a northerly direction along and with the east boundary line of the said C. W. Buckley Survey to the northeast corner of same, the same being a point in the west boundary line of the said Jno. M. Taylor Survey No. 12;

Thence in a westerly direction along and with the north boundary line of the said C. W. Buckley Survey to the northwest corner of same, the same being the northeast corner of the Spyar Singleton Survey;

Thence in a westerly direction along and with the north boundary line of the said Spyar Singleton Survey to a point where the same intersects the west boundary line of Archer County, Texas;

Thence in a northerly direction along and with the west boundary [fol. 29] line of said Archer County, Texas, to the northeast corner of same;

Thence in an easterly direction along and with the north boundary line of said Archer County, Texas, to the northeast corner of same;

Thence in a southerly direction along and with the east boundary line of said Archer County, Texas, to a point where the same intersects the north bank of the Little Wichita River;

Thence in a westerly direction up the north bank of the said Little Wichita River with its meanderings to a point where the same intersects the west boundary line of the George C. Bruner Survey;

Thence in a southerly direction along and with the west boundary line of the said George C. Bruner Survey to the southwest corner of same, the same being a point in the north boundary line of the John Kelly Survey;

Thence in a westerly direction along and with the north boundary line of the said John Kelly Survey to the northwest corner of same, the same being a point in the south boundary line of the Saml. H. Barnwell Survey;

Thence in a southerly direction along and with the west boundary line of the said John Kelly Survey to the southwest corner of same, the same being the southeast corner of the Hershell Corzine Survey;

Thence in a westerly direction along and with the south boundary line of the said Hershell Corzine Survey to a point where the same intersects the west boundary line of the Newton County School Land Survey;

Thence in a southerly direction along and with the west boundary line of the said Newton County School Land Survey to a point where the same intersects the south boundary line of the Rachel Story Survey;

[fol. 30] Thence in a westerly direction along and with the south boundary line of the said Rachel Story Survey to a point where the same is intersected by the east boundary line of the Wm. Henry Survey;

Thence in a southerly direction along and with the east boundary line of the said Wm. Henry Survey to the southeast corner of same, the same being a point in the north boundary line of the J. W. Scott Survey;

Thence in a westerly direction along and with the north boundary line of the said J. W. Scott Survey to the northwest corner of same;

Thence in a southerly direction along and with the west boundary line of the said J. W. Scott Survey to a point where the same intersects the center of Main Street of Martin's Addition to the Town of Archer City, Texas, as shown by the map and plat of said Addition of record in Volume S, pages 624 and 625 of the Deed Records of Archer County, Texas, the said Martin's Addition being a subdivision of the S. P. R. R. Co. Survey, No. 1;

Thence in a westerly direction down the center of said Main Street of said Addition about one mile and 100 feet to a point where the same intersects the west boundary line of said Martin's Addition, and continuing in a westerly direction down the center of Main Street of said Town of Archer City, Texas, to a point where the same intersects the center of Sycamore Street;

Thence in a southerly direction down the center of Sycamore Street to a point in same due east of the center of the Court House of the County of Archer, Texas;

Thence due west to the center of said Court House of Archer County, Texas, the place of beginning.

[fol. 31] 4th. That the above described territory is situated wholly within Archer County, Texas, and does not overlap or embrace any

part of a political subdivision, or defined road district that has heretofore been established and issued road bonds which are now outstanding and unpaid.

Dated the 17th day of January, A. D. 1924.

L. L. Hudson, J. V. Langan, D. E. Shattuck, Mrs. D. E. Shattuck, H. W. Akin, E. R. Ballowe, Jno. E. Robinson, J. M. Robinson, Mrs. J. A. Kirkland, Mrs. J. L. Baker, Mrs. W. H. Milan, W. A. Lemond, W. H. Milan, E. J. Phillips, J. R. Newman, G. H. Strange, James A. Seigler, J. W. McCaslin, R. E. Andrews, S. V. Hawkins, Sam Moorhead, Mrs. J. W. McCaslin, B. H. Hodges, J. D. Powell, Mollie Hodges, Mrs. E. A. Powell, Eula Moorhead, Mrs. J. C. Marks, Mrs. R. E. Andrews, S. A. Woodward, W. L. Andress, Sam Love, Willie Gardner, Mrs. Sam Love, W. T. Mayes, H. H. Joiner, Mrs. W. T. Mayes, Mrs. H. H. Joiner, Mrs. G. H. Cross, H. E. Hannah, Calvin Benson, H. W. Hannah, H. A. Moldram, Mrs. V. Hannah, M. J. Noldram, N. C. Wilson, Jessie Benson, C. F. Goodwin, Fred Lewis, A. E. Drummond, Ma Annie Lewis, R. N. Chancellor, Harold D. Smith, Lillian Powell, Rev. B. B. Hall, Mrs. B. B. Hall, Mrs. J. A. Light, Mrs. Cora Lee Gragg, H. M. Rushing, S. A. Rushing, Bulah Lewis, Bus Lewis, Mrs. J. A. Seigler, Mrs. Minnie Seigler, W. A. Metcalf, W. A. Metcalf, Geanema Metcalf, Jess Metcalf, Mrs. W. T. Metcalf, Annie Hart, Mrs. W. L. Andrews, A. Minnich, S. O. Kelley, Mrs. Ripley H. Smith, J. A. Seigler.

[fol. 32] EXHIBIT "C" TO BILL OF COMPLAINT

Order of the Commissioners' Court Establishing Road District No. 2, of Archer County, Texas

THE STATE OF TEXAS,
County of Archer:

In the Commissioners' Court of Archer County, Texas, January Term, 1924

On this, the 17th day of January, A. D. 1924, the County Commissioners' Court of Archer County, Texas, convened in regular session, at the regular meeting place thereof in the Courthouse at Archer City, Texas, all the members of said Court, to-wit: E. M. Hooper, County Judge; E. A. McDonald, Commissioner Precinct No. 1; H. Hunchrath, Commissioner Precinct No. 2; D. L. Bishop, Commissioner Precinct No. 3; E. A. Herndon, Commissioner Precinct No. 4, being present and passed the following order:

Whereas, a petition signed by L. L. Hudson and 73 other persons, has this day been presented to this Court praying that bonds be issued in the sum of Three Hundred Thousand ($300,000.00) Dollars for the purpose of constructing, maintaining and operating

macadamized, graveled or paved roads and turnpikes, or in aid thereof, within the territory therein defined and which said petitioners pray this court to create as a road district to be known and designated as "Road District No. 2 of Archer County, Texas"; and,

It appearing to the Court that said petition bears the requisite number of signatures of resident property tax paying voters within the proposed road district; and,

It further appearing to the Court that it is desirable to establish said road district; and,

[fol. 33] It further appearing to the Court that the boundaries of said proposed district as described and defined in said petition do not overlap or embrace any part of a political subdivision or defined road district that has heretofore been established and issued road bonds which are now outstanding and unpaid; and,

And it further appearing to the Court that all the territory to be included within the said proposed district is wholly within Archer County, Texas;

I

That Road District No. 2 of Archer County, Texas, in the State of Texas, be, and the same is hereby established within the following metes and bounds, to-wit: Same description as in Exhibit "B."

II

That said road district No. 2 of Archer County, Texas, is hereby established for the purpose of constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof, within and for said district, under and by virtue of the Constitution and Laws of the State of Texas, including Chapter 2, Title 18, Revised Statutes, 1911, as amended by Chapter 203, Acts of 1917, Regular Session, and Chapter 18, Acts Fourth Called Session of the Thirty-Fifth Legislature, and the said District is hereby made and created a body corporate.

III

It is further ordered by the Court that if the proposition to issue Three Thousand ($300,000.00) Dollars of Road Bonds as prayed for in said petition does not receive a two-thirds majority of the vote cast at the election to be ordered by this Court for the purpose of determining whether or not said bonds shall be issued by said District, [fol. 34] then this order shall become wholly null and void, but if said proposition shall receive such necessary favorable vote this order shall then remain in full force and effect while said bonds, or any of them, are outstanding obligations of said Road District.

Passed and signed in open Court.

E. M. Hooper, County Judge. E. A. McDonald, Commissioner Precinct No. 1. H. Munchrath, Commissioner Precinct No. 2. D. L. Bishop, Commissioner Precinct No. 3. E. A. Herndon, Commissioner Precinct No. 4.

ARCHER COUNTY, TEXAS:

Upon the motion of Commissioner A. Herndon, and Seconded by Commissioner E. A. McDonald the foregoing order was passed by the following vote:

Aye: Commissioners E. A. Herndon, E. A. McDonald, and D. L. Bishop.
No: Commissioner H. Munchrath.

EXHIBIT D 1 TO BILL OF COMPLAINT

Order of Election in Road District No. 2 of Archer County, Texas

THE STATE OF TEXAS,
County of Archer:

IN THE COMMISSIONERS' COURT OF ARCHER COUNTY, TEXAS,
JANUARY TERM, 1924

On this, the 17th day of January, 1924, the Commissioners' Court [fol. 35] of Archer County, Texas, convened in regular session, at the regular meeting place thereof in the Court House at Archer City, Texas, all the member- of the Court, to-wit: E. M. Hooper, County Judge; E. A. McDonald, Commissioner Precinct No. 1; H. Munchrath, Commissioner Precinct No. 2; D. L. Bishop, Commissioner Precinct No. 3; E. A. Herndon, Commissioner Precinct No. 4, being present, came on to be considered the petition of L. L Hudson and 73 other persons, praying that bonds be issued by said District No. 2 of Archer County, Texas, in the sum of Three Hundred Thousand and no /100 ($300,000.00) Dollars, bearing interest at the rate to be fixed by the Commissioner's Court of said County not exceeding five and one-half (5½) per centum per annum, interest payable semi-annually, and maturing at such time or times as may be fixed by the Commissioners' Court, serially or otherwise, not to exceed thirty years from the date thereof, for the purpose of constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof; and whether or not a tax shall be levied upon the property of said proposed road district, subject to taxation, for the purpose of paying the interest on said bonds and to provide a sinking fund for the redemption thereof at maturity; and

It appearing to the Court that said petition is signed by more than fifty of the resident property tax paying voters of said Road District No. 2 of Archer County, Texas, and

It further appearing that the amount of bonds to be issued will not exceed one-fourth of the assessed valuation of the real property of said Road District No. 2, of Archer County, Texas; and

[fol 36] It further appearing that said Road District No. 2 of Archer County, Texas, has been duly established by an order of the

Commissioners' Court of Archer County, Texas dated the 17th day of January, A. D. 1924, of record in Book F, pages 457 et seq., of the Minutes of said Court, and the boundaries thereof are herein described as described and defind in the order of the Commissioners' Court establishing said District, as follows, to-wit:

Same description as in Exhibit "B."

It further appearing that said district does not embrace any part of a political subdivision or defined road district that has been heretofore established and has issued bonds which are now outstandng and unpaid;

It is therefore considered and ordered by the Court that an election be held in said Road District No. 2, of Archer County, Texas, on the 23rd day of February, A. D. 1924, which is not less than thirty days from the date of this order, to determine whether or not the bonds of said Road District No. 2 of Archer County, Texas, shall be issued in the amount of Three Hundred Thousand and no/100 ($300,000.00) Dollars, bearing interest at the rate to be fixed by the Commissioners' Court of said County not exceeding five and one-half per centum per annum, interest payable semi-annually, and maturing at such time or times as may be fixed by the Commissioners' Court, serially or otherwise, not to exceed thirty years from the date thereof, for the purpose of constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof; and whether or not a tax shall be levied upon the property of said Road District No. 2 of Archer County,Texas, subject to taxation, for the purpose of paying the interest on said bonds and to provide a sinking fund for the redemption thereof at maturity.

[fol 37] The said election shall be held under the provisions of Articles 627 to 641, inclusive, of Chapter 2, Title 18, Revised Statutes, 1911, as amended by Sec. 1, Chapter 203, Acts of 1917, Regular Session.

All persons who are legally qualified voters of this State and of this county, and who are resident property tax payers in Road District No. 2 of Archer County, Texas, shall be entitled to vote at said election, and all voters desiring to support the proposition to issue the bonds shall have written or printed on their ballots, the words;

"For the issuance of bonds and the levying of the tax in payment thereof."

And those opposed shall have written or printed on their ballots, the words:

"Against the issuance of bonds and the levying of the tax in payment thereof.

The polling places and presiding officers of said election shall be respectively as follows:

At Tom Hart's Grocery Store in the Wilcox Bldg., in Voting Precinct N. E. Archer City, No. 1, with W. O. Covington as Presiding Officer.

At the Holliday School House in the town of Holliday in Voting Precinct Holliday No. 2, with J. A. Howard as Presiding Officer.

At the Bowman School House in Voting Precinct Bowman No. 3, with R. A. Crowell as Presiding Officer.

At the Liberty School House in Voting Precinct Liberty No. 4, with O. F. Ashbrook as Presiding Officer.

At the Lake Creek School House in Voting Precinct Lake Creek No. 5, with Will Henderson as Presiding Officer.

At the Baxter School House in Voting Precinct Baxter No. 11, with J. H. Whittaker as Presiding Officer.

[fol. 38] At the Dundee School House in the Town of Dundee in Voting Precinct Dundee No. 12, with J. D. Smyth as Presiding Officer.

At the Geraldine School House in Voting Precinct Geraldine No. 13, with Geo. Parrish as Presiding Officer.

At the Office of the Archer Realty Company in the town of Archer City in Voting Precinct N. W. Archer City No. 23, with W. L. Andrews as Presiding Officer.

The manner of holding said election shall be governed by the General Laws of the State of Texas, regulating general elections, when not in conflict with the provisions of the Statutes hereinabove referred to.

Notice of said election shall be given by publication of a copy of this order in the Archer County News, a newspaper published in said Road District No. 2, of Archer County, Texas, for four successive weeks before the date of said election, and, in addition thereto, there shall be posted other copies of this order at three public places in said Road District No. 2 of Archer County, Texas, for three weeks prior to said election.

The County Judge is hereby directed to cause said notices to be published and posted, as hereinabove directed, and further orders are reserved until the returns of said election are made by the duly authorized election officers and received by this Court.

Passed and signed in open court.

E. M. Hooper, County Judge; E. A. McDonald, Commissioner, Precinct No. 1; H. Munchrath, Commissioner, Precinct No. 2; D. L. Bishop, Commissioner, Precinct No. 3; E. A. Herndon, Commissioner, Precinct No. 4. (Seal.)

[fol. 39] ARCHER COUNTY, TEXAS:

Upon the motion of Commissioner E. A. Herndon, and seconded by E. A. McDonald the foregoing order was passed by the following vote:

Aye: Commissioners E. A. Herndon, E. A. McDonald, and D. L. Bishop.

No: Commissioner H. Munchrath.

Order Canvassing Returns and Declaring Result of Election Held in Road District No. 2 of Archer County, Texas

THE STATE OF TEXAS,
County of Archer:

IN THE COMMISSIONERS' COURT OF ARCHER COUNTY, TEXAS

On this, the 28th day of February, A. D. 1924, the Commissioners' Court of Archer County, Texas, convened in regular session at the regular meeting place thereof in the Courthouse at Archer City, Texas, all members of the Court, to-wit: E. M. Hooper, County Judge; E. A. McDonald, Commissioner Precinct No. 1; H. Munchrath, Commissioner Precinct No. 2; D. L. Bishop, Commissioner Precinct No. 3; E. A. Herndon, Commissioner Precinct No. 4, being present, came on to be considered the returns of an election held on the 23rd day of February, to determine whether or not the bonds of Road District No. 2 of Archer County, Texas, should be issued to the amount of Three Hundred Thousand ($300,000.00) Dollars, bearing interest at the rate to be fixed by the Commissioners' Court of said County not exceeding five and one-half (5½) per centum per annum, interest payable semi-annually, and maturing at such time or times as may be fixed by the Commissioners' Court, serially or otherwise, not to exceed thirty days from the date thereof, [fol. 40] for the purpose of constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes or in aid thereof; and whether or not a tax shall be annually levied, assessed and collected in said Road District No. 2 of Archer County, Texas, sufficient to pay the current interest on said bonds, and to provide the required sinking fund to redeem them at maturity, and,

It appearing that said election was in all respects lawfully held, and said returns duly and legally made, and that there were cast at said election 405 votes of which number 303 votes were case "For the Issuance of Bonds and the Levying of the Tax in Payment Thereof", and 102 votes case "Against the Issuance of Bonds and the Levying of the Tax in Payment Thereof."

It is therefore ordered and declared that the proposition to issue said bonds and levy said tax was sustained by a two-thirds majority of the qualified property taxpayers voting at said election, and that the Commissioners' Court of the said County is authorized to issue said bonds, and to levy and have assessed and collected said tax.

Passed and signed in open Court.

E. M. Hooper, County Judge; E. A. McDonald, Commissioner, Precinct No. 1; H. Munchrath, Commissioner, Precinct No. 2; D. L. Bishop, Commissioner, Precinct No. 3; E. A. Herndon, Commissioner, Precinct No. 4. (Seal of Commissioners' Court.)

[fol. 41] EXHIBIT "D" TO BILL OF COMPLAINT

Order Authorizing the Issuance of the Bonds for Road District No. 2, of Archer County, Texas

THE STATE OF TEXAS,
County of Archer:

IN THE COMMISSIONERS' COURT OF ARCHER COUNTY, TEXAS

On this, the 28th day of February, 1924, the County Commissioners' Court of Archer County, Texas, convened in regular session at the regular meeting place thereof in the Courthouse of Archer City, Texas, all member of the Court, to-wit: E. M. Hooper, County Judge; E. A. McDonald, Commissioner Precinct No. 1; H. Munchrath, Commissioner Precinct No. 2; D. L. Bishop, Commissioner Precinct No. 3; E. A. Herndon, Commissioner, Precinct No. 4, being present, and passed the following order:

Whereas, on the 17th day of January, 1924, there was presented to this Court a petition signed by the requisite number of qualified resident taxpaying voters of Road District No. 2 of Archer County, Texas, praying that an election be ordered to determine whether or not the bonds of said Road District No. 2 of Archer County, Texas, shall be issued in the amount of Three Hundred Thousand ($300,000.00) Dollars, bearing interest at the rate to be fixed by the Commissioners' Court of said County not exceeding five and one-half (5½) per centum per annum, interest payable semi-annually, and maturing at such time or times as may be fixed by the Commissioners' Court, serially or otherwise, not to exceed thirty years from the date thereof, for the purpose of constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof, within and for said District, and the levy of a tax upon the property of said District, subject to taxation, for the purpose of paying the interest on said bonds and to [fol. 42] provide a sinking fund for the redemption thereof at maturity; and,

Whereas, this Court, pursuant to said petition, on said date, ordered that an election be held throughout said District on the 23rd day of February, 1924, as prayed for; and,

Whereas, notice of said election was given by publication in the Archer County News, a newspaper published in said District, and which notice was published for four successive weeks next prior to the date of said election, and, in addition thereto, notice thereof was posted at three public places in said District, for at least three weeks preceding the date of said election; and

Whereas, said election was duly and legally held on said 23rd day of February, 1923, and the result of said election was duly certified and returned to this Court by th- Judges and Clerks thereof; and,

Whereas, on the 28th day of February, 1924, this Court considered the several returns and canvassed the same, and found that there were cast at said election 405 votes, of which number 303 votes were cast "For the Issuance of Bonds and the Levying of the Tax in Payment Thereof", and 102 votes were cast "Against the Issuance of Bonds and the Levying of the Tax in Payment Thereof", and this Court thereupon, by order entered, declared that the proposition so submitted was sustained and adopted by a two-thirds vote of the qualified resident property taxpayers voting at said election; and,

Whereas, this Court has examined into and investigated the regularity of the proceedings for said election and finds that the same was duly and legally held; that the notice required by law to be given has been duly and legally given; and that said election was conducted in strict conformity with all the requirements of law;

Therefore, be it ordered, adjudged and decreed by the Commissioners' Court of Archer County, Texas:

[fol. 43]

I

That the bonds of said Road District No. 2, of Archer County, Texas, to be known as Road Bonds of Road District No. 2 of Archer County, Texas, be issued on the faith and credit of said Road District No. 2, of Archer County, Texas, under and by virtue of the Constitution and Laws of the State of Texas, including Articles 627 to 641 inclusive, of Chapter 2, Title 12, Revised Statutes, 1911, as amended by Section 1, Chapter 203, Acts of 1917 Regular Session.

II

That said bonds are issued for the purpose of constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof, within and for said Road District No. 2, of Archer County, Texas.

III

That said bonds shall be numbered consecutively from one to three hundred, inclusive, and shall be of the denomination of One Thousand ($1,000.00) Dollars each, aggregating Three Hundred — ($300,000.00) Dollars.

IV

That said bonds shall be dated the 1st day of March, 1924, and shall become due and payable serially according to the following schedule:

Bond numbers	Dates of maturity	Amount
1 to 5, inclusive	1st day of March, 1925	$5,000.00
6 to 10, inclusive	1st day of March, 1926	$5,000.00
11 to 15, inclusive	1st day of March, 1927	$5,000.00
16 to 20, inclusive	1st day of March, 1928	$5,000.00
21 to 26, inclusive	1st day of March, 1929	$6,000.00
27 to 32, inclusive	1st day of March, 1930	$6,000.00
33 to 38, inclusive	1st day of March, 1931	$6,000.00
39 to 44, inclusive	1st day of March, 1932	$6,000.00

[fol. 44]

45 to 51, inclusive	1st day of March, 1933	$7,000.00
52 to 58, inclusive	1st day of March, 1934	$7,000.00
59 to 65, inclusive	1st day of March, 1935	$7,000.00
66 to 72, inclusive	1st day of March, 1936	$7,000.00
73 to 80, inclusive	1st day of March, 1937	$8,000.00
81 to 88, inclusive	1st day of March, 1938	$8,000.00
89 to 97, inclusive	1st day of March, 1939	$9,000.00
98 to 106, inclusive	1st day of March, 1940	$9,000.00
107 to 116, inclusive	1st day of March, 1941	$10,000.00
117 to 126, inclusive	1st day of March, 1942	$10,000.00
127 to 137, inclusive	1st day of March, 1943	$11,000.00
138 to 148, inclusive	1st day of March, 1944	$11,000.00
149 to 160, inclusive	1st day of March, 1945	$12,000.00
161 to 172, inclusive	1st day of March, 1946	$12,000.00
173 to 186, inclusive	1st day of March, 1947	$14,000.00
187 to 200, inclusive	1st day of March, 1948	$14,000.00
201 to 215, inclusive	1st day of March, 1949	$15,000.00
216 to 230, inclusive	1st day of March, 1950	$15,000.00
231 to 247, inclusive	1st day of March, 1951	$17,000.00
248 to 264, inclusive	1st day of March, 1952	$17,000.00
265 to 282, inclusive	1st day of March, 1953	$18,000.00
283 to 300, inclusive	1st day of March, 1954	$18,000.00

V

That said bonds shall bear interest at the rate of five and one-half (5½) per centum per annum, payable on the first day of March, 1925, and semi-annually thereafter on the 1st day of September and the 1st day of March of each year, and the principal and interest shall be payable upon presentation and surrender of bonds or proper coupons, in lawful money of the United States of America, at the Hanover National Bank of New York City, N. Y.

VI

That each of said bonds shall be signed by the County Judge, [fol. 45] countersigned by the County Clerk, and registered by the County Treasurer, and the seal of the Commissioners' Court shall be impressed upon each of them.

VII

That the form of each of said bonds shall be substantially as follows:

No. —. Dollars, 1,000.00.

United States of America,

State of Texas,

County of Archer

Road Bond of Road District No. 2 of Archer County, Texas

Know all men by these presents: That Road District No. 2 of Archer County, Texas, for value received, acknowledges itself indebted to and hereby promises to pay to bearer One Thousand ($1,000.00) Dollars in lawful money of the United States of America, on the 1st day of March, 19—, with interest thereon from the date hereof at the rate of five and one-half (5½) per centum per annum, interest payable on the 1st day of March, 1925, and semi-annually thereafter on the 1st day of September and the 1st day of March of each year, on presentation and surrender of the annexed interest coupons as they severally mature.

Both principal and interest of this bond are hereby made payable at the Hanover National Bank of New York, City, N. Y., and for the prompt payment of this bond and the interest thereon at maturity, the full faith, credit and resources of said Road District No. 2 of Archer County, Texas, are hereby irrevocably pledged.

This bond is one of a series of three hundred bonds, numbered consecutively from one to three hundred inclusive, of the denomination of One Thousand ($1,000.00) Dollars, each aggregating Three Hundred Thousand ($300,000.00) Dollars, issued for the purpose of constructing, maintaining and operating macadamized, graveled [fol. 46] or paved roads and turnpikes, or in aid thereof, within and for said Road District No. 2 of Archer County, Texas, under and in strict conformity with the Constitution and Laws of the State of Texas, including Articles 627 to 641, inclusive, of Chapter 2, Title 18, Revised Statutes, 1911, as amended by Section 1, Chapter 203, Acts of 1917, Regular Session, and pursuant to an order passed by the Commissioners' Court of Archer County, Texas, on the 28th day of February, 1924, which order is of record in Book —, pages —, et seq., of the minutes of said Court.

The date of this bond, in conformity with the order above mentioned, is the 1st day of March, 1924.

And it is hereby certified and recited that the issuance of this bond, and the series of which it is a part, is duly authorized by law and a two-thirds majority of the qualified resident property taxpaying voters of Road District No. 2, of Archer County, Texas, voting at an election duly held for that purpose within said Road District on the 23rd day of February, 1924; that all acts, conditions and things

required to be done precedent to and in the issuance of this series of bonds, and of this bond, have been properly done and performed and have happened in regular and due time, form and manner as required by law; that a direct annual tax has been levied upon all the taxable property in the said Road District sufficient to pay the interest on this bond and the principal thereof at maturity; and that the total indebtedness of said Road District, including this bond, does not exceed any Constitutional or statutory limitation.

In testimony whereof, the County Commissioners' Court of Archer County, Texas, has caused the seal of said Court to be affixed hereto, and this bond to be signed by the County Judge, countersigned by the County Clerk, and registered by the County Treasurer of said County, and the interest coupons hereto attached to be executed by the facsimile signatures of said County Judge and County Clerk, [fol. 47] as of the 1st day of March, 1924.

—— ——, County Judge, Archer County, Texas.

Countersigned: —— ——, County Clerk, Archer County, Texas.
Registered: —— ——, County Treasurer, Archer County, Texas.

VIII

That the facsimile signatures of the County Judge and the County Clerk shall be lithographed or printed on the coupons attached to said bonds, and shall have the same effect as if they had been signed by them.

IX

The form of interest coupon, attached to said bonds shall be substantially as follows:

No. 1. $55.00.

On the 1st day of March, 1925, Road District No. 2 of Archer County, Texas, will pay to bearer, at the Hanover National Bank of New York City, N. Y., the sum of Fifty-Five ($55.00) Dollars, being the interest due that day on Road Bond No. — of Road District No. 2, of Archer County, Texas.

—— ——, County Judge. —— ——, County Clerk.

X

That the following certificate shall be printed on the back of each bond:

Office of the Comptroller, State of Texas

Register No. —

I hereby certify that there is on file and of record in my office a certificate of the Attorney General of the State of Texas, to the effect that this bond has been examined by him as required by Article 632, Revised Statutes, 1911, as amended by Section 1, Chapter 203, Acts

[fol. 48] of 1917, Regular Session, and that he finds that it has been issued in conformity with the Constitution and laws of the State of Texas, and that it is a valid and binding obligation upon said Road District No. 2, of Archer County, Texas, and said bond has this day been registered by me.

Witness my hand and seal of my office at Austin, Texas, this — day of ——, 192-.

—— ——, Comptroller of Public Accounty of the State of Texas.

XI

It is further ordered that whiel said bonds, or any of them, are outstanding and unpaid, there shall be, and it is hereby ordered, that there be levied and assessed and collected in due time, form and manner, and at the time other County taxes are levied, assessed and collected, in each year, a tax upon all the taxable property in said Road District No. 2, of Archer County, Texas, sufficient to pay the current interest on said bonds and to pay each installment of the principal thereof as the same becomes due, and to pay the interest on said bonds and the principal to become due the first year, there is hereby levied a tax of forty three (43) cents on each One Hundred Dollars valuation of taxable property in said Road District No. 2 of Archer County, Texas, for the year 1924, and the same shall be assessed and collected and applied to the purpose named.

XII

It is also ordered that E. M. Hooper, County Judge of Archer County, Texas, be authorized to take and have charge of all necessary records pending investigation by the Attorney General, and shall take and have charge and control of the bonds herein authorized pending their approval by the Attorney General and registration by the Comptroller of Public Accounts.

[fol. 49] E. M. Hooper, County Judge. E. A. McDonald, Commissioner Precinct No. 1. H. Munchrath, Commissioner Precinct No. 2. D. L. Bishop, Commissioner Precinct No. 3. E. A. Herndon, Commissioner Precinct No. 4. (Seal of Commissioners' Court.)

Statement of Indebtedness of Road District No. 2 of Archer County, Texas

STATE OF TEXAS,
County of Archer:

The following is a complete statement of the indebtedness of Road District No. 2, of Archer County, Texas, on the 28th day of February, 1924, the date of the Order Authorizing the Issuance of Bonds:

Proposed Bonds: Dated the 1st day of March, 1924, maturing serially in thirty years, bearing interest at the rate of 5½ per cent per annum, $300,000.00.

Outstanding Bonds: None.

STATE OF TEXAS,
County of Archer:

I, Coff C. Conner, Clerk of the County Court and Ex-Officio Clerk of the Commissioners' Court of said County, do hereby certify that the foregoing statement exhibits a true and correct account of the indebtedness of Road District of Archer County, Texas, of every character existing on the said 28th day of February, 1924, as shown by the records of said Court.

Witness my Hand and Seal of Office, this the 28th day of February, 1924.

Coff C. Conner, Clerk of the County Court and ex Officio Clerk of the Commissioners' Court of Archer County Texas.

[fol. 50] STATE OF TEXAS,
County of Archer:

I hereby certify that the above statement as to the indebtedness of Road District No. 2 of Archer County, Texas, is true and correct as shown by the records of my office.

Witness my official signature, this, the 28th day of February, 1924.

Lulu Woodard, County Treasurer, Archer County, Texas.

Affidavit of Assessor and Collector as to Taxable Values of Road District No. 2 of Archer County, Texas

THE STATE OF TEXAS,
Archer County:

We, C. S. Morris and C. E. Goodwin, Assessor and Collector, respectively, of the County of Archer, State of Texas, being duly sworn, severally say:

1. That the assessed valuation of the Real Property of said Road District No. 2, of Archer County, Texas, for the year 1923, as shown by the annual assessment of said real property for said year 1923, and made for State and County taxation, in the sum of $2,805,635.00.

2. That the assessed valuation of the Personal Property of said Road District No. 2 of Archer County, Texas, for the year 1923, as shown by the annual assessment of said Personal Property for said year, 1923, and made for State and County taxation, is the sum of $2,877,724.00.

3. That the aggregate amount of the Real and Personal property assessed valuation in said Road District No. 2 of Archer County, Texas, for the year 1923, as shown by the said annual assessment of said real and personal property for said year 1923, and made for said State and County taxation, is the sum of $5,683,359.00.

[fol. 51] 4. That the assessed valuations of all of said property mentioned in the above paragraphs appear upon said assessment rolls and were taken by us from said rolls of said County for the year 1923.

5. That the statements contained in said four paragraphs are true and correct and were made from and after a personal examination of said assessment rolls for the State and County for the Year 1923, and are the same valuation shown by said rolls.

C. S. Morris, Tax Assessor of Archer Country, Texas. C. E. Goodwin, Tax Collector of Archer County, Texas.

Sworn to and subscribed before me, on this the 28th day of February, 1924. E. M. Hooper, County Judge Archer County, Texas.

Constitution of Texas, Section 52, Article 3

The Legislature shall have no power to authorize any county, city town or other political corporation or subdivision of the state, to lend its credit or to grant public money or thing of value in aid of, or to, any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company; provided, however, that under legislature provision any county, any political subdivision of a county, any number of adjoining counties, or any political subdivision of the state, or any defined district now or hereafter to be described and defined within the state of Texas, and which may or may not include towns, villages or municipal corporations, upon a vote of a two-thirds majority of the resident property taxpayers voting thereon who are qualified electors of such [fol. 52] district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of this constitution and levy and collect such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the legislature may authorize, and in such manner as it may authorize the same, for the following purposes, to-wit:

(c) The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof.

Article 627. Power to Issue Road, etc., Bonds and Levy Tax for Interest and Sinking Fund.—Any county in this State or any political subdivision or defined district, now or hereafter to be described and defined, of a county, is hereby authorized and empowered to issue bonds, or otherwise lend its credit, in any amount not to exceed one-fourth of the assessed valuation of the real property of such county, or political subdivision, or defined district thereof, and to levy and collect such taxes to pay the interest upon such bonds and provide a sinking fund for the redemption thereof, for the purpose of constructing and maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof.

Article 628. Election for: Propositions, Restrictions and Requirements; Provision as to Interest.—Upon the petition of fifty, or a

majority of resident property taxpaying voters of any county, or political subdivision or defined district of any county in this State, to the County Commissioners' Court of such county, such court shall have the power, and it is hereby made its duty, at any regular or special session thereof, to order an election to be held in [fol. 53] such county, political subdivision or defined district thereof, to determine whether or not the bonds of such county, or political subdivision or defined district thereof, shall be issued in any amount not to exceed one-fourth of the assessed valuation of the real property of such county, or political subdivision, or defined district, for the purpose of constructing, maintaining or operating macadamized, graveled or paved roads and turnpikes, or in aid thereof; and, at such election, there shall also be submitted to such resident property taxpaying voters the question as to whether or not a tax shall be levied upon the property of said county, or political subdivision or defined district thereof, subject to taxation, for the purpose of paying the interest on said bonds and to provide a sinking fund for the redemption thereof. The amount of bonds proposed to be issued, with rate of interest thereon and date of maturity, shall be stated in the order ordering said election, and in the notice therefor; or such order and notice may provide that the bonds may bear interest at a rate to be fixed by the commissioners' court, not to exceed five and one-half per cent, and the bonds may mature at such times as may be fixed by the commissioners' court, serially or otherwise, not to exceed thirty years from their date, except as otherwise provided in Articles 637a and 637b hereof; provided that where such election is ordered for a political subdivision or defined district of a county, other than the whole county, such order and notice of election shall describe the boundaries thereof as described and defined in the order of the county establishing such political subdivisions or defined district of the county.

Article 629. Notice of Election.—Notice of said election shall be given by publication, in a newspaper published in the county for four successive weeks, and in addition thereto by posting notices at three public places in the county, one of which shall be at the court house door for three weeks prior to said election, if said proposed [fol. 54] issue of bonds and levy of taxes is for the entire county. If said proposed issue of bonds and levy of taxes is for any political subdivision or defined district of the county, notice of such election shall be given by publishing, in a newspaper published in the political subdivision or defined district in which such bond is proposed, and, if no newspaper is published in such political subdivision or defined district, then in some newspaper published in the county, for four successive weeks, and by posting in at least three public places in such political subdivision or defined district of the county, for three successive weeks prior to said election.

Article 630. Time, Place and Manner of Holding Election.—The commissioners' court of the county shall determine the time and place or places of holding such election; provided, no such election shall be held at any time less than thirty days from the time of

making of the order ordering the election. The manner of holding said election shall be governed by the general laws of the state when not in conflict with the provisions of this subdivision of this chapter, and the returns of said election shall be made as now provided by law for making returns of elections held for the purpose of determining whether or not county bonds shall be issued.

Article 631. If Election Carried by Two-Thirds Vote, Bonds to Be Issued.—If, after the result of said election is known, it shall appear to the commissioners' court of the county in which said election was held, that a two-thirds majority of the vote cast at such election were in favor of the issuance of bonds, it shall be the duty of said commissioners' court, as soon thereafter as practicable, to issue said bonds on the faith and credit of said county, or of said political subdivision of defined district now or hereafter to be described and defined, within the State of Texas, and which may or may not include towns, villages, or municipal corporations of the county, as the case may be.

[fol. 55] Article 632. Bonds, Term, Interest, Examination, Registry, Custody; sale; disposition of proceeds; Disbursement, Regulation of.—Such bonds shall mature not later than thirty years from their date, except as otherwise provided in Articles 637a and 637b hereof, with such options of redemption as may be fixed by the commissioners' court, or such bonds may be issued to mature serially in approximately equal portions every year, for not exceeding thirty years; and such bonds shall bear not more than five and one-half per cent interest per annum, and which bonds shall be examined by the Attorney General of Texas, and registered by the Comptroller of Public Accounts of Texas, and such bonds, when so issued, shall continue in the custody of and under the control of the commissioners' court of the county in which they were issued and shall be by said court sold to the highest and best bidder, for cash, either in whole or in parcels, at not less than their par value, and the purchase money therefor shall be placed in the county treasury of such county to the credit of the available road fund of such county, or of such political subdivision or defined district of such county, as the case may be; provided, that the expense incurred in surveying the boundaries of a political subdivision or defined district of the county and other expenses incident to the issuance of bonds of such political subdivisions or defined districts shall be paid from the proceeds of the sale of the bonds of the district. Such funds shall be paid out by the county treasurer upon warrants drawn on such funds issued by the county clerk of the county, countersigned by the county judge, upon certified accounts approved by the commissioners court of the county, when such funds belong to the entire county; and, when such funds belong to a political subdivision or defined district of the county, they shall be paid out by the county treasurer upon warrants issued by the county clerk, upon certified accounts of the road superintendent of such road district, and approved by the commissioners court of the county.

[fol. 56] Article 633. General Laws Applicable.—The general laws of Texas relative to county bonds, not in conflict with the provisions of this subdivision of this chapter, shall apply to the issuance, approval, registration, sale and payment of the bonds provided for in said provisions.

Article 634. Tax for Interest and Sinking Fund; Levy, Assessment and Collection; Treasurer to be Custodian, and to Deposit with Depository.—Before said road bonds shall be put on the market, the county commissioners court of the county in which such election was held shall levy a tax sufficient to pay the interest on such bonds and to produce a sinking fund sufficient to pay the bonds at maturity; provided, that said tax herein authorized shall be assessed and collected in the same manner as now provided by law for the assessment and collection of other road taxes, if for a whole county, and if for a political subdivision or other defined district of a county, then it shall be assessed and collected as is now provided by law for the assessment and collection of common school district special local taxes. And it is hereby made the duty of such commissioners court to levy such tax, and it is hereby made the duty of the tax collector and assessor of such county wherein such taxes have been levied to assess and collect the same in the same manner and at the same time as other taxes. And such taxes, when so collected by such collector, shall be by him paid over to the county treasurer of such county, as when other taxes are paid to the county treasurer. And the county treasurer of said county shall be custodian of all funds collected by virtue of this law, and shall deposit the same with the county depository as county funds.

Article 635. Treasurer to Pay Interest and Sinking Fund.—The treasurer shall pay the interest and principal as it becomes due on such bonds out of the funds so collected, in the same manner as the law directs in case of county courthouse bond funds.

[fol. 57] Article 636. Numbering of Districts and Bonds to Correspond, etc., Designation of Bonds. Provisions Not Applicable to Bonds of Whole County, Designation of Latter.—For the purpose of operating and being known under the provisions of this subdivision of this Chapter, each political subdivision or defined district now or hereafter to be described and defined for the employment of said subdivision, in any county in this State, shall be known as "Road District No. — of —— County, Texas, and the bonds herein provided for in such political subdivision or defined district in any county, shall be known as "Road Bonds of Road District No. — of —— County, Texas," being definitely numbered and bearing the name of the county in which it is located. This article shall apply only to districts composing less than a county and shall not apply to bonds issued hereunder by a whole county, which county bonds shall be known as "—— County Special Road Bonds," taking the name of the county issuing the same.

Article 637.—For the purpose of this subdivision of this chapter, any political subdivision of a county or defined district, now or here-

after to be described and defined, accepting the provisions of said subdivision, by voting such tax, is hereby made and created a body corporate, which may sue and be sued in like manner as counties.

EXHIBIT TO BILL OF COMPLAINT

(Here follows map, marked side folio page 57½)

[fol. 58] IN UNITED STATES DISTRICT COURT

ANSWER—Filed June 25, 1924

The answer of the above named defendants to the Bill of Complaint of the above named plaintiffs.

In answer to the said Bill we, E. M. Hooper, E. E. McDonald, E. L. Bishop, E. A. Herndon, Henry Munchrath, C. S. Morris and C. E. Goodwin, say as follows:

1. We admit the allegations contained in Paragraph No. 1, of complainants Bill of Complaint.

2. We admit that road district No. Two (2), was created by the Commissioners' Court of Archer County, Texas, the election ordered to determine whether or not said road district should issue bonds in the sum of $300,000.00 which election was held and resulted in favor of the Bonds which result was so declared and a tax levy made, on the property situated in said road district to pay the interest and provide a sinking fund, to pay same at maturity, as charged in complainants Bill of Complaint, by the Commissioners Court of said Archer County, Texas.

3. We further say that said road District was created and the Bond Election ordered and all orders necessary and incident thereto were done under by virtue of the provisions of Article 627-641 inclusive of Chapter 2, Title 18, of the Revised Statute of the State of Texas for 1911, as amended by Section 1, Chapter 203, Acts of the Regular Session of the Legislature 1917. And Section 52 of Article 3, of the Constitution of the State of Texas.

4. We deny that the law under which said road district was created, the bonds voted and the tax levied is violative of the first section of the fourteenth amendment of the Constitution of the United States, guaranteeing to the citizens of the United States the equal protection and due process of law.

5. We say that the creation of said road district, the ordering of [fol. 59] the election, the voting of the bonds and the issuance thereof, levying of the taxes to take care of such obligations, is wholly pursuant to and in accordance with the provisions of the constitution and laws of the State of Texas; that due notice was given of all proceedings as required by the constitution and laws of the State

of Texas, pertaining to the issuance of such bonds; that said constitution and laws were strictly followed in all respects in the creation of said road district No. 2, in ordering the election, the issuance of the bonds and providing for the payment of same by the levy of the taxes.

6. We deny that the steps taken for and the creation of said road district No. 2 was done with the view of building a system of highways in Archer County without regard to complainants' rights, and that any of the steps taken were done unlawfully or in view of or in order to carry out any arbitrary conspiracy upon the part of the defendants herein, or that the same was done for the purpose of defeating justice and equity.

7. We deny that the commissioners' court entered into any conspiracy with the voters of the northwest portion — said Archer County for the purpose of establishing said road district No. 2 so as to include the property of complainants and the other property east of the Wichita Falls & Southern Rail Road tracks in order to raise revenue from their property and others in said district similarly situated without regard to the benefit the construction thereof would be to their property.

8. We deny and especially does defendant E. M. Hooper deny that we were responsible for the plan proposed in the organization and the creation of said road district and that any influence was wielded by any of these defendants and especially E. M. Hooper in furtherance of any plan connected therewith.

9. As to the allegation in complainants bill of complaint that there is sufficient property valuation in said county other than the property of complainants and that which is situated east of said rail road tracks to warrant the creation of a road district or road [fol. 60] districts for the purpose of establishing a system of highways in said county, we say; that Art. 628, of the revised Civil Statutes of the State of Texas, provides among other things that upon petition of fifty or a majority of the property tax-paying voters of a proposed road district filed with the commissioners' court of a county it becomes the mandatory and ministerial duty of such court to create such district and order the election for the voting of the bonds, and therefore we say; that the commissioners' court of Archer *Court* had no discretion in the premises but were bound under the law to create said road district and order the election and do all other things incident thereto as charged in complainants' bill of complaint without reference to or consideration of property not contained within the boundaries of said proposed road district No. 2.

10. We deny that complainants are entitled to any relief whatsoever, or any part of the relief in said bill of complaint demanded, and allege that complainants have no standing in this court or any court of equity.

Wherefore we say that the writs of injunctions as prayed for in complainants bill of complaint ought not to be granted and that complainants' bill of complaint should be dismissed, with costs.

Jno. R. Moore, W. E. Forgy, Solicitors for Defendants, Archer City, Texas.

The facts set forth in said answer were sworn to upon information and belief by the Defendant E. M. Hooper.

[fol. 60a] IN UNITED STATES DISTRICT COURT

Statement of Evidence—Filed Jan. 17, 1925

The appellants, pursuant to Section B, Equity Rule 75, file the following as their statement of the evidence, introduced on the trial of said cause:

[fol. 61] AGREED STATEMENT OF FACTS

It was agreed that:

On the 17th of January, 1924, a petition for the creation of Road District No. 2, was presented to the Commissioners' Court of Archer County, praying first for an order of election to determine whether or not bonds of territory in Archer County to be known as Road District No. 2, be issued in the amount of $300,000.00, bearing 5½% interest per annum and maturing at such time or times as may be fixed by the Commissioners' Court serially or otherwise, not to exceed thirty years from the date thereof for the purpose of constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof and whether or not a tax shall be levied upon the property of said district, subject to taxation for the purpose of paying the interest on the bonds and to provide a sinking fund for the redemption thereof at [fol. 62] maturity.

The territory to comprise Road District No. 2, is described by metes and bounds, but for brevity, we will simply say that it comprises practically all of the North one-half of the County, excepting a small portion of such North one-half lying in the Eastern part of County, South of the Little Wichita River. The diagram of the County attached to this brief delineates the bounds of the district in colors, as set forth in the petition. The petition bears the names of seventy-four persons who describe themselves as qualified tax paying voters within said Road District. On the same day, an order was entered by the Court creating and establishing said Road District within the boundaries and as prayed for in the petition.

The order recites the filing of the petition, that it bears the requisite number of signatures, that it is desirable to establish the district; that the boundaries of the district do not overlap any pre-

existing district; that the territory embraced is wholly in Archer County, that the District is established to construct, operate and maintain roads, and if the bonds are not carried the order is to be void.

Thereafter on the same day an order was entered by the Com- [fol. 63] missioners' Court which after reciting the Court's consideration of the petition for the Road District and the fact that the desire of the petitioners with respect to the disposition of the proceedings of the bond issue, if carried proceeds, in conformity with the desire of the petitioners to designate the following roads to be constructed, maintained nad operated, to wit: The Wichita Falls, Holliday, Dundee and Seymour road known as the Ozark Trail; the Archer City and Wichita Falls road, known as the Southwest Trail, a road six miles in length from Holliday to a point in an Easterly direction from the town of Holliday to the road known as the Wichita Falls and Archer City road; and a road running Northwesterly from Dundee, six miles in length to the Wichita Falls Irrigation Project Division Dam.

On the same day, an order of election was entered by the Court on the above mentioned petition calling an election to be held in said district, describing the same, for the purpose of determining whether or not the bonds of the district to the amount of $300,000.00 bearing interest at a rate to be fixed by the County Commissioners' Court payable semi-annually, and maturing at such time or times as may [fol. 64] be fixed by the Commissioners' Court not to exceed thirty years from the date thereof, for the purpose of constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof; and whether or not a tax shall be levied upon the property of such Road District subject to taxation for the purpose of paying the interest on the bonds and to provide a sinking fund for the redemption thereof at maturity. The polling places were specified, and notice of the election ordered to be published. Notice of the election was duly given by publication as provided by law. The election was held on the 23rd of February, the result thereof canvassed on the 28th and the results thereof declared to be in favor of the bonds, it appearing that four hundred and five votes were cast, of which number three hundred and three were for the bonds.

On the same date, an order was entered authorizing the issuance of bonds providing the denomination thereof, the rate of interest, the dates of maturity, the form thereof and levying a tax of 43 cents on each One Hundred Dollars valuation of taxable property for the year 1924, and ordering the assessment and collection thereof for [fol. 65] the purpose named in the election and further ordering the levy, assessment and collection of a tax in each successive year for 28 years, sufficient to pay the interest on the bonds, and to pay each installment of the principal thereof as it matures.

According to the certificate of the tax assessor and collector, the total valuation of real and personal property of the district as shown by the assessment roll for 1923 is $5,683,359.00. There was next introduced in evidence a plat of the County showing the boundaries

of Road District No. 2 and the roads set out in the order of the Commissioners' Court to be improved with the proceeds of the proposed bonds. A copy of said map is made exhibit "A" to the complaint.

The constitutional and statutory provision (Sec. 52, Art. 3, of the Constitution and Comp. Statutes, 1920, Art. 627-637-2827 and 2836), were offered in evidence and are the same statutes copied and attached as exhibits to the bill of complaint filed herein, to which reference is here made.

The bonds have been submitted to the Attorney General of Texas [fol. 66] for approval and the order ordering the assessment and collection of the taxes upon the taxable property of the district certified to the tax assessor and tax collector of Archer County.

The tax assessor of the County, C. S. Morris, testified that pursuant to said orders, he has assessed the tax levied upon all the taxable property of the district. That the district comprises about the North half of the County. That his records show the rendition of the taxes for the year 1923, that the total assessed valuation of the real and personal property belonging to the persons signing the petition for Road District No. 2 is $111,388.00. The total assessed valuation of the real and personal property belonging to the complainants in this case being $257,080.00. That of the seventy-four persons signing the road petition, twelve render no property whatever for taxation. W. L. Andrews who signed the petition owns the principal amount of property, his rendition being $60,500.00. Most of the signers of the petition reside in or near Archer City.

No consideration whatever was given by him or the Board of [fol. 67] Equalization to the question whether or not all of the property in Road District No. 2, would be equally benefited by the proposed roads under the election. That the same valuation for Road District purposes was used for general advalorem purposes.

E. M. Hooper, the County Judge of Archer County testified that he and the other defendants were County Commissioners of Archer County, comprising the County Commissioners' Court thereof; that the complainants except G. W. Edgin reside in Wichita County, but have property in Archer County.

That no orders have been entered by the County Commissioners' Court in reference to Road District No. 2, except those introduced and put on the minutes of the Court.

That the nearest part of the Ozark Trail to any of the property of the plaintiffs in the case would be about twelve miles; from that point the road extends away from their property in a Southwesterly direction. The Archer City and Wichita Falls road or Southwest Trail as shown on the map would be within three miles of the closest point to Perry Browning's property; that he did not know whether it would be nearer to the Wichita Falls business district coming over [fol. 68] this road than by other existing roads near Browning's property; that it would be about eight miles to the business district of Wichita Falls from Perry Browning's property and about seven miles from where the Southwest Trail intersects the Wichita County line to the business district of Wichita Falls in a Northeasterly direction.

Browning's property is the closest to the Southwest Trail of any of the plaintiffs in the case. The property intervening the Southwest Trail and plaintiff's property is generally mesquite land used for grazing purposes, some of it is cut up into small tracts. From the Southwest Trail West to Perry Browning and Gant's land, the country is pretty well settled up. From the Liberty School House on the Southeast corner of Blk. 48, L. F. Wilson's land, to the West, there is a road running through to the East side of the County through the Lake Creek Settlement. In the Lake Creek settlement, which is a territory about eight miles square in the Northeast corner of the County, there are one or two roads, perhaps three or four, in a westerly direction to the Southwest Trail. They do not go to [fol. 69] the East side of the County, they cross the railroad and serve a settlement in that part of the County.

The Meridian Highway enters the North line of Archer County, runs South to Scotland from about a mile and a half to two miles from the East line of the County. The most of the travel in that territory East of the track in District 2, is over that road which has been established for a great many years. I do not know how long.

The road proposed from Dundee to the Diversion Dam is in the Northwest part of the County. It is about six miles long. The road from Holliday East to the Wichita Falls and Archer City road is shown approximately on the map. The road from Wichita Falls to Archer City is about twenty-one miles long. The Ozark Trail in Archer County about eighteen miles. In making up this bond issue, it was estimated that these roads would cost approximately $5,000.00 per mile. We consulted engineers and approximated the amount that would be necessary to build the roads before we voted the bonds and figured $5,000.00 a mile as the County's part. The Southwest Trail is a State Highway, the Ozark Trail is a State and Federal Highway. On the Ozark Trail, we contemplate State and Federal aid and on the Southwest Trail we contemplate state aid only, unless [fol. 70] it is designated as a Federal Highway.

Before Road District No. 2 was created, the matter was discussed in the County two or three months. The Commissioners' Court did not give the plaintiffs any notice that their land was to be included in Road District No. 2. The matter had been discussed with the Commissioners' Court at various times, but the Court was not in session. In passing upon the petition for Road District No. 2, the Court was guided only by the petition. In the event the petition was legally drawn, it was considered that it was not discretionary with the Court to refuse the same. We have been so advised and acted on that advice in this case.

As to whether in creating the district the question of benefit to the property was considered, we did consider it would benefit all the property of the district as it would better transportation facilities and that always has a tendency to benefit any country or community. The plaintiffs in the case would be directly benefited as it would place a hard surface road nearer to them than it exists at the present time. In the event of bad weather, they could use this road [fol. 71] to get into Wichita Falls. From the Coleman ranch house

to Wichita Falls is about eighteen miles via Meridian Highway. If the Southwest Trail runs as we think, it will be six or seven miles from his ranch house. There is no road from his ranch house to the pavement, but one can be built. However, after he gets to the Southwest Trail, he would still have seventeen or eighteen miles to go into Wichita Falls.

Mr. Gant's property is about eleven miles from Wichita Falls over the Meridian Highway, he would have to go west five or six miles to get to the Southwest Trail. At the point where he would reach the Southwest Trail he would be seven miles from the business section of Wichita Falls. However, paving would not be of any special benefit to him going into Wichita Falls, because he can reach a paved road at the present nearest point on the Southwest Trail. That is also true of Perry Browning and G. W. Edgin and of the Dale Brothers, while the South end of the Dale Brothers' place would be in the same situation as Coleman's.

The Commissioners' Court knew in a general way the location of [fol. 72] all the property in the district, it also knew the entire district would be benefited if these roads were built. We believe the Ozark Trail would be of benefit to these plaintiffs. We figured the future growth of the County hinged on its transportation facilities and anything that would better the transportation facilities will certainly benefit the property of the residents of the County. It is too big a question for me to go into. The Dundee and Diversion Dam route would only benefit them because they are in the district and the district as a whole is benefited. As to the Southwest Trail and Ozark Trail connections from Holliday, if any of the complainants should want to go to Dundee as soon as they got on the Southwest Trail four or five miles, they would have a hard surface road to go on and at the present time they have not any; in that way they would be benefited; it is a system of Highways all through that district that is a benefit to the district. The natural market place of the district is Wichita Falls. All of these roads pass through Wichita Falls.

There are railroad facilities covering practically the same territory covered by the Southwest Trail and the Ozark Trail. There is no railroad passing through the eastern part of the county, Wind- [fol. 73] thorst, Scotland and the Southeast part of the County.

Prior to the time Road District No. 2 was created, the Commissioners' Court had rejected a petition to create a district out of a small portion of the East side of the County. The matter of improving the Meridian Highway was discussed by the Court, but there was no order made on the minutes. That Highway traverses about as thickly settled a portion of the County as there is. It is the most thickly settled portion of the County, the communities of Windthorst and Scotland have been settled from twenty-five to thirty years. The Meridian Highway is a public road, it is a dirt road just like the other roals in the County.

The biggest portion of the Southwest Trail goes through what is known as Uncle Luke Wilson's ranch, then for a short distance, six

or seven miles from Wichita Falls, it goes through a farming district settled somewhat the same as the Lake Creek settlement.

When I say that all of the property of the district will be benefited by the building of these roads, I do not mean that it will all be bene-
[fol. 74] fited in the same proportion. Real estate on the Highway will receive a greater benefit than property a few miles further away; the same would hold good as to personal property, but not on as large a scale.

The voting strength of this district lies West of the Wichita Falls and Southern track, I would say nine-tenths of it lies West. I knew this at the time the petition was voted on by the Commissioners' Court. It is a circumstance that has been existing for some time and every one knew it. I would judge that about one-tenth of the real and personal property values of the district lie East of the Wichita Southern track.

The matter of building these roads had been considered three or four months before the petition was filed. We had a great many meetings throughout the County at which the matter was discussed. We were trying to arrive at some scheme, some understanding, so that everybody could vote on bonds for the entire County and not have to cut it up into districts. These people never expressed any desire not to support a bond issue that would give them roads of some sort, they were willing to tax themselves for roads, if roads were
[fol. 75] built that would meet with their approval. The particular kind of road they would be satisfied with was not gone into. A graveled road was generally considered satisfactory. I knew that at the time the petition for road district No. 2, was adopted.

It would have been a very simple matter to have included enough money in the bond issue for road district No. 2, to build a road from the Wichita County line down through the Lake Creek Community to the Wichita River. I don't know how long the petition was circulated before it was acted upon, not over two days. With one exception everyone who signed the petition is a resident of Archer City. I live here also. Forty-five Thousand Dollars would build about nine miles of road without any other aid. If a road were built from the Wichita County line in the East side of the County towards the Little Wichita River $45,000.00 would end the road three and one-half or four miles miles from the South line of the district, the Little Wichita River. Fifteen to Twenty Thousand Dollars would have been sufficient to complete the Road on to the River; I knew that when the petition was being circulated. I think W. E. Forgy drew up the petition; I think we considered that it
[fol. 76] was important to try to serve the two hundred families South of the Wichita River just out of the direction, but we were just allowing the petition as drawn and presented before us. We dropped the idea of trying to figure a system of Highways for the County that would be most beneficial to the County after we found out we couldn't get a County wide bond issue to carry. We found we could not get a system of Highways that would get the approval of everybody.

I had a part in drawing the petition for Road District No. 2.

The reason the second petition was drawn, the first petition showed that a rider had been stuck on by the Dundee Commissioner and the petition was vague and indefinite and not clear as to the amount of the bonds and was illegal on its face and would not stand up and we knew we would be faced with some sort of litigation and we wanted one drawn up absolutely correct.

The boundaries of the road district cross the road between Archer City and Windthorst and Scotland about a mile out of Archer City. So far as Road District No. 2, is concerned, the people out there [fol. 77] could build a road into Archer City. However, Road District No. 4 joins No. 2, so that they would be cut off completely from voting bonds and building a road into Archer City. There is no provision made in either District No. 4 or No. 2, to build a Highway to connect up with any road that might be built by them into Archer City.

On cross examination, he testified: I acted on the petition for the creation of Road District No. 2, as a member of the Commissioners' Court. I was trying to get for the County and into all of the various parts of the County, a system of Highways to serve the greatest number of people. I would not think there was over nineteen or twenty houses between the Wichita County line and the Little Wichita River along the Meridian Highway. I do not believe there is a single house on the Meridian Highway between the Little Wichita River and where Mr. Gant's property is; that is, laying right close to the road. It is about five miles from the Little Wichita River to Lake Creek. Outside of the ranches, there are no settlements to be served with a road in that community. There are about fifteen or twenty houses close to the road in the Lake Creek Community. Mr. Gant's is off the road; Mr. McDonald's a little [fol. 78] East of that; Mr. Storm lives on the road. The Dale property is grazing land; so is Mr. Coleman's. Mr. Gant lives in Wichita Falls; so does Mr. Browning. Mr. Coleman's family lives in Wichita Falls. I don't know of any arbit-ary conduct on the part of the Commissioners' Court seeking to take taxes from anybody without reasonable and just compensation in the way of roads. We were trying to arrange this system where each portion of the district would receive benefit.

At the time the petition for Road District No. 2, was presented to the Court, we did not consider how the various and sundry people residing in the District would be affected by the bond issue with reference to each other. I do not understand it to be our duty to look into the merits and demerits or the purposes of the proposed district, as to how it would affect different people and tax payers and as to the equity of the proposition. I understood that it was mandatory that the Commissioners' Court approve the district established by a legally drawn petition of the requisite number of property owners and taxpaying voters and order an election and that is what we did in this case. It was not our intention in creating this district and [fol. 79] ordering the election to interfere with the people in the eastern part of the County in securing a road to Wichita Falls or any other place.

With reference to a road in the Lake Creek Community, it was agreed by us, but no order was entered that we would build a road to Lake Creek, each of the roads was to have so much as was necessary to be expended in the building of the road as set out in that order. We figured after we built the designated roads, we would have about $45,000.00 left and we could safely spend as much as $30,000.00 up there and let $15,000.00 be used for other expenses. It has been mutually agreed between me and the Commissioners that that much will be spent on the Lake Creek road; that is the intention now if the bonds are sold.

When the petition for Road District No. 2, was presented to the Court it was granted and the election ordered without regard to whom it would affect; we felt it to be our duty to do that. I had nothing to do with the circulation of the petition.

It was agreed that there were seven hundred and ninety-six poll [fol. 80] taxes paid by the tax payers of Road District No. 2, for 1923, of which fifty-two were paid in the Lake Creek voting precinct.

E. A. McDonald, one of the County Commissioners of Archer County residing at Lake Creek testified: My understanding was Road District No. 2, was to include all the North half of the County. The property owners were not notified, but they discussed the matter at a meeting when the Court was not in session.

My understanding of the law is where the proper number of property tax payers sign and present a petition to the Court, it is not optional with the court to grant the petition. I do not understand that the Court has any right to change it, but must order the election as the petition calls for. That was my understanding when I acted on this petition. I did not think anything about whether we could exclude certain property or include other property as we saw fit. I considered that a dead issue.

I am a member of the Board of Equalization; we have equalized the taxes for this year. I don't think in equalizing the taxes the road was ever considered in making up the valuation of the property. [fol. 81] We just assessed the valuation for this year as we have for all previous years and left it for the tax assessor to put the different taxes on the property according to the value of the property. We merely put different values on different lands according to its classification under the statute. That was our intention.

The nearest point to the Southwest Trail from Perry Browning's land is about two and one-half or three miles, at a point about half a mile South of the Spillway so that if Perry Browning wanted to come in via Spillway, he would get the benefit of about one-half mile of the trail. There is very little difference in the distance from his place to Wichita Falls by this route and by way of the old Meridian Highway. There is a road between these two roads, we call the Lake Creek road that makes it closer to Wichita Falls, the one that crosses the bridge down by the swimming hole at Wichita Falls. From Mr. Tom Gant's place to the nearest point on the Southwest Trail is eight or ten miles. The Dale ranch would be about the same distance. The Coleman ranch comes up to within two and one-half or three miles. The ranch house is about Scotland some-

[fol. 82] thing like five miles to the Southwest Trail. The Southwest Trail angles some from the North of Archer City. Coleman's ranch house is a little West of Scotland, from Scotland to the Southwest Trail looks to be about ten or twelve miles. The further South you go, the further you get from the Trail. The Lake Creek road running South of Wichita Falls down into that country is used almost exclusively for Wichita trade. That road serves a whole lot of people; I don't know just how many. There are two roads running into Wichita Falls from that country. From the North side of the County ten miles in length and ten miles in depth, there are a good many people. I do not know whether there would be fifty families or not. I would not guess it at over thirty at the outside. To come from Lake Creek by the Liberty School House to Wichita Falls over the Southwest Trail, it would be about nineteen miles. It is seven miles from my place to the Liberty School House and when I get to the Liberty School House, it is twelve miles from my place to Wichita Falls. It would be nonsense for a man to go that way. He could go around in by Scotland and intersect the Wichita Falls and go on to Wichita Falls; any man who makes that [fol. 83] route would be crazy; if you go directly West, the Liberty School house is the closest point on the Southwest Trail to the Lake Creek Community except at the Spillway. I don't go by the Spillway, it is too much out of my way.

On cross examination he testified, a road could not be built from the Lake Creek Community in a Northwesterly direction running into the Southwest Trail very conveniently. If you were going to build a road in that direction at all, my idea would be you would hit the Southwest Trail about the Spillway if you run it to suit most people. If you run it this way, I expect the road would be possibly ten miles long. If you built the road on the Lake Creek road to Wichita Falls, the distance would be about nine miles; it may not be more than eight. In coming to Archer City, I come from my place straight to the Liberty School House and in on the Southwest Trail. If the Southwest trail was built and a good road was built from the center of the Lake Creek Community intersecting the Southwest Trail that would give the Lake Creek Community good road to Archer City, the County seat.

At the time this election was ordered, my understanding with the [fol. 84] Court was that Lake Creek was to have a road. The Judge asked me whether Lake Creek wanted a road and I told him I did not know; that they all kind of blowed up and quit me. He asked me if Lake Creek had rather have a road from the Lake Creek Community to the Southwest Trail or to the County line toward Wichita and he says we will leave it open and let them settle it among themselves. I live in this Community myself, it is in my Commissioners' Precinct. I had that understanding with the members of the Court at the time the election was ordered. We have discussed the matter very little since then, but it is still my understanding and has been all the time. When the bonds are sold, we would not build the Meridian Highway but would either build to intersect the Southwest Trail or up to the Wichita County line.

The Board of Equalization in assessing the land of the County took into consideration the quality of the land and the improvements on it. A hundred acres of land in the middle of Archer City is worth more than one hundred acres in the Southeast corner of the County. We took into consideration its reference to roads, railroads [fol. 85] and highways. We did not take into consideration the Southwest Trail, the Ozark Trail and these other roads as we have not built the highway yet, as we have not been able to sell the bonds on account of this suit I do not know as a matter of fact, whether the bonds will ever be sold or whether we will ever get the money to build the roads. If we had a hard surfaced road from here to Wichita, I would consider the property along the highway worth more than land ten miles away. If I sat as a Board of Equalization, I would take that into consideration in placing values on the land. A great deal of the land in the Lake Creek Community is grazing land; some of it is farming land. Most of the farming land is in the Northwest side of the community. The farming section is nearer the Southwest trail than the grazing land.

On re-direct examination, he testified that he was mistaken in the distance from the Southwest Trail to the closest point of Perry Browning's place; that the distance is about four miles; that it is about four miles from Brownings to the Spillway. It would be about five miles from his house to Wichita Falls via the Lake Creek [fol. 86] road and about eleven miles via Spillway.

E. L. Bishop, one of the defendants, County Commissioner of Precinct No. 3, residing in the Southwest part of the County, testified: I have been present this year when the Commissioners' Court had under consideration the creation of Road District No. 2. I remember the order designating the road that would be built with the proceeds of the bonds if they were voted. I do not recall the court ever entering any other order respecting that matter. As I understand it, I do not think the Commissioners' Court had any right to change the boundaries of the Road District as set out in the petition. It was with that understanding in view that I acted on this petition as one of the Commissioners. I have taken no official action as a Commissioner except as shown by the minutes of the Court. I have watched that very carefully.

On cross-examination he testified: I remember a discussion with Mr. McDonald about the building of the Lake Creek road. We agreed that we would turn over enough money to build some road down there leading out from the Highway or connecting up with the [fol. 87] County line over there. I am still a member of the Court and am still willing to do that.

On redirect examination he testified: There was no agreement of that kind reduced to writing and made a part of the record. It was just oral; there was no formal vote on it; it was agreed to by all, notwithstanding we had entered an order designating where the money should be used. I understood also that the Commissioners' Court could not change this order they have on the books.

E. H. HERNDON, one of the defendants, a County Commissioner of Archer County residing near Dundee testified: I have been present when the Commissioners' Court had under consideration the creation of Road District No. 2. I recall the order entered designating the roads to be built from the proceeds of the bonds, if voted. I do not recall any other order with reference to the disposition of this bond money. No such order has been entered while I was present and I have attended all the meetings. In the order creating the road district, we included the same property mentioned in the petition. It was my understanding that the Commissioners' Court could not change the boundaries of the district as set out in the petition. [fol. 88] That they had to allow the petition as presented, if it was legal on its face; that is what the Court did.

I would judge that about 75% of the total votes in Road District No. 2, are West of the Wichita Falls and Southern track and 25% on the East side of the track.

On cross-examination, he testified: I did not take into consideration where people lived or what part of the County the different people lived in, in granting the order for an election. I understood that when a petition was presented in legal and proper shape, it was my duty to vote to order an election regardless of where people lived and I did that. It was agreed that there were no orders or resolutions entered by the Commissioners' Court pertaining to Road District No. 2, except those entered in evidence and made a part of this record.

HENRY MUNCHRATH, one of the defendants, County Commissioner for Precinct No. 2, testified: I have been Commissioner nine years; I was present this year when the Court had under consideration the matter of creating road District No. 2. I recall the order that was entered designating the roads to be built with the money [fol. 89] derived from the bond issue. The matter of what it would cost to build the roads mentioned in the order was talked of in Court. They figured they would cost about $8,000.00 a mile for Federal roads and $6,000.00 a mile for State roads. The election was ordered for only enough money to build the Ozark Trail, the Southwest Trail six miles from Dundee and six miles from Holliday. As one time there was talk that there would be $50,000.00 to build the Windthorst and Wichita Falls road. It was never agreed to do that; to my knowledge there was never any agreement made such as testified to by Mr. McDonald. I was present at all of the meetings of the Court, the matter was discussed. It was our understanding in granting this petition that we could not change the boundaries of the district.

I am familiar with the property of the plaintiffs in this case. From Mr. Gant's place to the Liberty School House the nearest route would be ten miles is my best judgment. The County is thirty miles square. The Southwest Trail would come into about three miles East of the center of the County at Archer City. It runs Northeasterly from Archer City to a point about five miles West of the [fol. 90] Northeast corner of the County. North of the Wichita

River in this direction on the East side, there is some grazing land and some farming land. About thirty families live in the district East of the Wichita Falls and Southern Railroad. There would be very few people adjacent to the Southwest Trail as it is proposed to be built. Immediately South of Road District No. 2, in the East part of the County is Scotland and Winthorst that are thickly settled farming communities. Windthorst was established about twenty-five years ago and Scotland about twenty-five or twenty-eight years ago. They have no railroad or transportation facilities except the dirt roads in that part of the country. The natural market and outlet for this country East of the track is Wichita Falls. Grain is usually hauled to the Railroad. The Old Meridian Highway in this part of the County has been there for over thirty-five years. It was through there thirty-one years ago when I came here. I guess the Lake Creek road was there before that. There are about one hundred and fifty families in the Windthorst and Scotland communities. About thirty in the Lake Creek Community and about one hundred outside of these that would use this road in the East [fol. 91] part of the County; two hundred and eighty or more in all.

From a practical standpoint the improvement of the Southwest Trail would not be of any benefit to the property of the people residing East of the Wichita Southern track. There was discussion regarding this matter before the Commissioners' Court; I raised the question. I do not think it was right to take these people over there and cut them off from ever getting a road. There was some discussion and the others were of the impression that it ought to go just the way the petition calls for. They were opposed to ever giving them a chance to have a road over there. That is the substance of the talk. I do not recall any discussion about this land being included for the purpose of reducing the tax rate on the remainder of the district. Scotland is in the East part of the County to the center about twenty-two miles from Scotland to Henrietta in Clay County Windthorst is a mile or a mile and a half from the eastern boundary line of Archer County. It is about the center of the County. It is about twenty-two miles from Scotland to Henrietta in Clay County and about twenty or twenty-two miles from Scotland to Wichita Falls [fol. 92] and about fourteen miles from Scotland to Archer City. Windthorst is about twenty-six miles from Henrietta, twelve miles from Archer City and forty miles from Jacksboro. The old Meredian Highway passes between Windthorst and Scotland on its way to Wichita Falls. It misses Scotland about a mile and a half, the road runs from Wichita Falls south to Windthorst, from Windthorst on into Antelope in Jack County, from Jack County to Mineral Wells and on down to San Antonio. I voted against ordering this bond election because I didn't think it was right to tax the people all over the County to build roads on the West side and because it overlapped Road District No. 1, and cut Windthorst and Scotland off from getting on outlet to Wichita Falls, our market. The main reason was I didn't think it would benefit the people on the East side of the County in and out of the district. I did not think it was right to include all the territory in the Western part of the County that was

included in the district. I do not live in Road District No. 2. I am interested in this law suit and have contributed to the prosecution of the suit. The reason I am interested is because I want to get a [fol. 93] road somewhere that I can get out. I am interested in getting a road to Archer City and one to Wichita Falls too. When the petition for Road District No. 4, was up, I objected because it did not include Windthorst and give us a chance to build a road from Archer City to Windthorst and from Windthorst to Wichita Falls. There was a petition presented to the Court to build a road from Archer City to Windthorst and from Windthorst to Wichita Falls. I was interested in having that district created. The Commissioners' Court rejected it. It is in litigation also. Following the rejection of that petition, this petition was granted over-lapping that district. It was all done at one meeting. Road District No. 4 also overlaps part of the territory included in Road District No. 1. The Commissioners' Court granted that petition to build a road from Archer City to Jacksboro. That district could have been so formed as to give Windthorst a road to Archer City, but that was not done. The proposed route has not as many as one-fourth the people on it as live at Windthorst and Scotland. It looks to me as though the Commissioners' Court were isolating these people.

[fol. 94] I do not know how many people live at Megargle; I expect more than at Windthorst. They do not live in Road District No. 2. Megargle is in the extreme Southwest part of the County; they are on a Highway and have a railroad. It is not much out of their way to come to Wichita Falls over the Southwest Trail. The people at Windthorst could come to Wichita Falls by coming to Archer City twelve miles out of their way. Windthorst has never been opposed to a highway coming via Windthorst to Archer City and on to Wichita Falls. If we had a road from Windthorst to Archer City in bad weather, we could drive that way. The only thing these people out there are after is just to get some outlet through the East side of the County and a road that would be of some benefit to them and the purpose of this suit is to prevent people being taxed for a road that would be of no benefit to them. Some of the people of Windthorst and Scotland have property in Road District No. 2. There are lots of people who have property there who don't even live in the County.

G W. Edgin, one of the plaintiffs residing on Lake Creek in Archer City in Road District No. 2, testified: I have lived in Archer [fol. 95] County about twenty-two years. I own some personal property in Road District No. 2. I know where the Southwest Trail is located in Archer County and where the Ozark Trail is purported to be in the Northwest part of the County. My home is something like six miles from the Southwest Trail. It is something like five miles from my place to the Wichita County line. I am about eleven or twelve miles South of Wichita Falls. To go from my place to Wichita Falls by the Southwest Trail would be something like

twenty miles, six miles West to the Southwest Trail and fourteen miles into Wichita Falls. I usually go to Archer City via Liberty School House and the Southwest Trail. Wichita Falls is the natural market where I ordinarily go to attend my business, get my supplies and market my produce. About the only business I have in Archer City is when I go to pay my taxes or when I am called there to Court. Archer City has 1,500 to 2,000 inhabitants and Wichita Falls something like forty-five or fifty thousand. Most of the people in my community do their marketing at Wichita Falls and go to Archer City only to pay their taxes.

[fol. 96] There is a considerable farming settlement in my country, fifty or seventy-five per cent of the territory is farming land; that is, could be put into farms. Fifty per cent of it is in farms now, there are about fifteen families living in the Lake Creek Community while there are some thirty or forty families directly served by the Lake Creek or Old Meridian Highway Road North of the Little Wichita River. There is considerable dairying and stock raising in that county. Mr. Coleman has quite a little cattle ranch and there are quite a number of little dairymen in that country. They market their produce at Wichita Falls. Part of the cattle are shipped from Luke Wilson and part from Wichita Falls. There is a market for cattle on foot, in Wichita Falls, the men buying to speculate and the butchers. There are two school houses in the Lake Creek district, one on the Lake Creek road and one on what we call the North Star route which connects with the Scotland road. The Lake Creek road connects with the Scotland road and from there down into Jack County at Jacksboro. The roads I have been talking about have been in this country all of the nineteen years I have been here. The Windthorst and Lake Creek roads have been used continuously by people [fol. 97] living in that country since then. The Lake Creek settlement has been there thirty or thirty-five years. Wichita Falls has been considered and used as the market for the people of that vicinity for thirty or thirty-five years. We have just ordinary country roads down there. There are no hard surfaced roads at all. In bad weather it is difficult to get over them. The Little Wichita River bottom is the worst part. The Southwest Trail wouldn't be of any benefit at all in marketing my stuff coming to them the way I do. It might be if I went via Archer City for the purpose of paying taxes or being called to court, it would not increase the value of my property in the least, it is too far away. It would not increase the value of the property on which I reside.

I voted in the election on the bonds for Road District No. 2. Forty-two votes were polled at the box where I voted, forty-one against the election and one in favor of it. One man told me he voted for it, that was our County Commissioner, Mr. McDonald.

I know the people in the East part of the County pretty well and have discussed the matter with reference to roads with them. Every man I talked to was in favor of goods roads, but they were [fol. 98] not in favor of this bond issue under the existing circumstances. In the first place a petition was drawn up for a road cutting off a district on the East side of the County. This petition

was gotten up by the Windthorst and Scotland Communities but was defeated. Afterwards, there was another election providing for the Southwest Trail, the Ozark Trail, a little road leading out to the Diversion Dam, and a road to intersect the Southwest Trail from Holliday; that was the way it was reported to us and after this the people of Lake Creek sat down on that. They thought it was something being voted on them that they were not going to derive any benefit from and they thought it would knock them out of getting any road in that portion of the County for a number of years. There was not one who was against good roads or against voting bonds. They would have been willing to vote bonds on themselves for a road to Wichita Falls. I discussed the matter with almost every man in our Community. We met from time to time and it was pretty generally discussed. I heard something of a purported agreement to the effect that there would be money voted in this bond issue for the purpose of building a road into the Lake Creek [fol. 99] Community from Wichita County. I never saw a copy of an order in which there was anything of the kind.

On cross-examination he testified: I lived about four and one-half miles on an air line from the East line of the County and about six miles from where I live to the closest place on the Southwest Trail, making about ten miles from the East line of the County to the Southwest Trail. From the Wichita County line into Wichita Falls on the Southwest Trail, they have a concrete road.

J. D. Meredith, of Moran, Texas, a property owner in Archer County, owning the land on which the plaintiff Edgin resides, testified: I have heard Mr. Edgin's testimony with reference to the location of the property and with respect to the various roads in the County. I lived in the County on this particular property about twenty years. I have not lived there for the last eleven years. Mr. Edgin's testimony with respect to the location of the property and the roads in the County is correct according to my knowledge. I don't think the hard surfacing or improving the Southwest Trail would affect the market value of my property. The improvement [fol. 100] of the Ozark Trail would be of no benefit to it. I know where Mr. Dale, Mr. Coleman, Mr. Gant, and Mr. Browning's property is. In my judgment the improvement of the Southwest Trail would not enhance the market value of their property or benefit it in any respect whatever. I don't think the improvement of the Southwest Trail would benefit any property East of the Wichita Falls and Southern track and North of the Wichita River for the reason that no one would travel the Southwest Trail to market in Wichita Falls.

J. T. S. Gant, one of the plaintiffs residing in Wichita Falls testified: I have lived in Archer County, first on the South side and then on Lake Creek in the Northeast portion of the County where my home is now. I have lived in Archer County twenty-seven or twenty-eight years. I have been away from the County a little over five years, but I call it my home. During the time I resided

in the County, I was Tax Assessor four years and Commissioner nearly six years of Precinct No. 1, which comprises the Northeast portion of the County. I am one of the plaintiffs in this case. I know the location and boundaries of Road District No. 2, and am [fol. 101] familiar with the roads in the County. I know the property values and location of the various properties in the County, as I was Tax Assessor four years I think I am pretty familiar with the values. As Commissioner of Precinct No. 1, I became familiar with the values of roads and road improvement in that territory. When I was first elected Commissioner, I grubbed the road out between Wichita Falls and Archer City and did the first grading on it. When I was first elected Commissioner, the road was practically grown up in Mesquite trees; that is the road that is now known as the Southwest Trail. I am familiar with the road that connects up the Lake Creek Community with Wichita Falls. That road is about six miles from the Southwest Trail the way you have to come to get on it to the Liberty School House. The next nearest point would be the point coming in at the Spillway. There is a long strip of country through there with no roads except these two. The Spillway is on the Wichita County line where the Southwest Trail intersects the Wichita County line. There is a road right close to the Railroad that goes to Archer City and another coming by my place to Wichita Falls. My land is about eight miles from the [fol. 102] Southwest Trail. From my house in Wichita to my home in Archer County is fourteen miles. It is about thirteen miles from my land to Wichita Falls. Going by the Southwest Trail to Wichita from my place would be about eight miles further; the roads in the Lake Creek Community are in fairly good shape now. They are just graded roads, not hard surfaced roads or graveled roads. In rainy weather they get pretty bad. They get to where I cannot travel with my car and I have been stuck several times.

The market for that territory East of the Southern tracks and North of the Wichita River is Wichita Falls, and has been ever since I lived there thirty years. Archer City has a population of fifteen hundred or two thousand people, while Wichita Falls claims a population of about fifty thousand. We do not go to Archer City to market at all, I know of none there. When I lived in the Southern part of the County we could not sell eggs in Archer City for five cents a dozen. The people of Lake Creek, Windthorst and Scotland run little dairies and market their stuff in Wichita Falls. I do not know of any industry that can be pursued in that county [fol. 103] where the product can be marketed in Archer City.

The Lake Creek Community has something like fifteen or sixteen families and on back North of the River East of the Railroad, there will be something like twenty-five to thirty families. The roads that extend down into Lake Creek extend South of the River by Scotland and Windhorst to Antelope and Jacksboro and there to Mineral Wells. The improvement of the Southwest Trail would not be of any benefit to my property or enhance its value. If I went to Archer City my nearest road would be through Scotland. It would be a detriment to my place to put a tax on me and never

have a bond voted in our Community. The same is true of all the property East of the track and North of the River, they would be cut off for thirty years if these bonds are put on us. It cuts that part of the County off so they couldn't get a road for thirty years. We people are all in favor of roads and in favor of issuing bonds and if they had done us like they did the people up in the Bowman Community and give us a road through our Community we would all have voted the bonds, but they didn't do it.

[fol. 104] We made an effort to get a road through that Community, there was a petition gotten up by some people at Windthorst to get a road that side of the County, but the petition was not granted. We had a mass meeting and tried to get them to *sut* us off six miles across that part of the County so we could vote bonds and build a road. If they had stated in their petition that they would build us a road like they did the others and connect up with the Holliday and Wichita Falls road, we would all favor it. I know where the Ozark Trail is in Archer County. The improvement of that road will be of no benefit whatever to the property owners in the Lake Creek Community, East of the track and North of the River. The closest end of the Ozark Trail is Wichita Falls. It goes out of the County close to the corner clear across the County from my place, probably a little over thirty miles. It would be about sixteen to twenty miles from my place to where the Ozark Trail comes out of Wichita County into Archer County.

On cross-examination he testified: A good deal of wheat, cotton and oats are raised in the Lake Creek Community. I think there are [fol. 105] three banks, one or two elevators and one or two gins in Archer City. A load of grain may be hauled to Archer City from that country occasionally. I don't know what is paid for wheat in Archer City, Wichita Falls or at any other place; I am not selling any. There is a switch at Luke Wilson across one end of Lake Community from two to four miles from the center of the Community. Huff is closer to the center than Luke Wilson. Luke Wilson and Huff are both on the Wichita Falls and Southern. Nobody hauls anything to Luke Wilson.

On re-direct examination he testified: There is no town at Luke Wilson and if there are any stores, they have been put there lately; there is nothing at Huff either. There was a house at Huff, but it was moved away several years ago. A man undertook to run a grocery store there, but he couldn't pay the price for produce that they could at Wichita Falls, and he soon went out of business. There is a road that the people can get to Luke Wilson from the Lake Creek Community. Wheat is brought and loaded on the car some times when you can get a car. There is a road from the Lake Creek Community to Huff. Through threshing time, the [fol. 106] grain men of Wichita Falls, have a man there to buy wheat from the people who want to sell direct from the thresher. There is no road from our community to Luke Wilson at all, there is one to Huff, part of it is graded, but about a mile and a half is not. Huff and Luke Wilson are about two miles from the Southwest Trail.

On re-cross examination he testified: With reference to the talk of the money to build a road through that country, I will say that Mr. McDonald told me of it and I went and saw the order and saw that it did not contain anything about the matter and I told Mr. McDonald about it and he said he thought he was to get it. I knew he wasn't going to get it. If the order had shown that we were going to get it, we would have voted it because we want a road. It would take more than $35,000.00 to build a road through our Community like the others. McDonald said he was offered $35,000.00. If there was a road built from the River to the Wichita County line, it would be satisfactory. If we had known we could get a road through our community we would have voted for the bonds. I don't know that $35,000.00 had been offered; I know that Mr. McDonald [fol. 107] said it was. I know the Commissioners' Court cannot give that money regardless of this suit, it takes money to build the other roads and maintain them, the order provides for building and maintaining the road. I don't know whether it was in the petition or not. It provided for building the road from Archer City to Wichita Falls, but it did not state anything about building a road from the Lake Creek Community. If it had provided it was to build a road from Lake Creek to the Wichita County line, we would want it of course, but we would want it to cross our precinct. I am interested in every man in Precinct No. 2, because Mr. Coleman's and Mr. Edward's ranches are on the far line of Two and they are the biggest tax payers in the Community.

I farm my land; this year I raised oats and cotton. I had forty-five or fifty acres of oats and one hundred and thirty or forty acres of cotton. I own three hundred and seventy-three acres and two hundred and twenty is in cultivation. Mr. Coleman has a considerable farm, several thousand acres, it is mostly ranch land. Mr. Edwards owns considerable land. He is a cattle man.

[fol. 108] AGREEMENT RE HIGHWAYS

It was agreed that the Southwest Trail is a designated Highway, by the State Highway Commissioner of Texas, and is now being maintained by the Highway department; that the Ozark Trail is a Federal Highway and is being maintained by the State and Federal Highway Department. That a State Highway is entitled to dollar for dollar from the State Highway Department to match money expended by Counties. That a Federal Highway is entitled to dollar for dollar from the Federal Government, and dollar for dollar from the State Government for each dollar expended by County or subdivisions thereof and that the report of the decisions of the Courts of Texas interpreting and construing the constitution and statutes involved in this suit are authentically reported in the Southwestern and Texas reports

WM. G. MORRISON, President of the Plains Paving Company for the past five years, by occupation a paving contractor residing at Wichita Falls, testified: Our business keeps me in touch with the cost of paving Highways throughout this country. I am familiar with and know the usual and customary cost of building the various classes of Highways being built throughout the country at the [fol. 109] present time. The roads being built at this time are, first, the graded roll road, sometimes this is graveled on top. The next is the graveled surface with a penetration top—a top construction built on a graveled foundation with hot asphalt top. Next, the concrete roads; next, macadam; next macadam foundation with brick surface.

I am familiar with the territory between Wichita Falls and Archer City. I have been down on the East side of Archer County through Lake Creek, Windthorst and Scotland, over the Ozark Trail and the Southwest Trail. So far as soil conditions are concerned, I do not think there would be any difference in the price of constructing either of the above mentioned classes of roads in that territory. With the possible exception that railroad points are closer on the Ozark Trail than the other. That would make an appreciable difference in the cost per mile. The only difference in cost would be the cost of hauling from a railroad point and that would vary. A graveled road would cost in the neighborhood of $6,000.00 a mile, possibly a little more. A graveled road with penetration top $10,000.00 a mile. A graveled road with concrete about $30,000.00 a mile. Gravel with hot mixed, asphalt $20,000.00 a [fol. 110] mile. Asphalt with graveled base or blocked base $20,000.00. Brick between $30,000.00 and $40,000.00. That would be a fair estimate for that territory of Archer County. My understanding is that the state and Federal Government pays about two-thirds of the cost of building rural roads, if built of cement. I don't know what the State alone would furnish on that. I do not know style of the suit I am testifying in, any of the parties to it, any particulars of the case, and none of the lawyers in the case have ever represented me in any matter.

PERRY BROWNING, one of the plaintiffs in the case residing at Wichita Falls, testified: I have resided in Wichita Falls about six years: I have never lived in Archer County. I own between twenty-four and twenty-five hundred acres and some horses, cattle, sheep, farming implements, etc. My land is located in the Northwest corner of Archer County. My house is about three miles East of the Wichita Falls and Southern Railroad track and not over two or three miles from the Northeast corner of the County. I have owned this property six years.

[fol. 111] I know where the Southwest and Ozark Trails are in Archer County. I am familiar with the boundaries of Road District No. 2, the nearest point to the Ozark Trail to my property would be twelve or fifteen miles. My house is about four and one-half miles on an air line from the Southwest Trail. The Lake

Creek road running from the Lake Creek Community to the Wichita County line runs through my place.

I am familiar with the proceedings had by the County Commissioners' Court to improve the Southwest and Ozark Trails and two small lateral roads. I do not consider that the improvement of either of these roads would be of any benefit to or increase the market value of my property. It would rather be an injury to it as it would double the tax and we would never get a paved road out our way. Either of these Highways would be usable by me or anyone living on my land as a practicable proposition. Neither of them traverse any territory used by me or anyone in that section of the country, going to a market. It is seven and one-half miles from my house via the Lake Creek road to the Court House at Wichita Falls. Going by the Southwest Trail, it would be twelve or thirteen miles. [fol. 112] It is two and one-half or three miles from my house to the North line of Archer County due North and about five and one-half or six miles to the Spillway on the Wichita county line and the Southwest Trail. It is almost as far to the Spillway as it is to town from my place. In going to Archer City from my place, I sometimes go through Scotland and sometimes by the Liberty School house. There is very little difference in the distance either way.

I am familiar with the country lying North of the River and East of the Wichita Southern tracks. The improvement of the Southwest and Ozark Trails would be of no benefit whatever to any real or personal property lying in that territory.

WM. COLEMAN, one of the plaintiffs residing in Wichita County, Texas, testified: I have lived in this country thirty-seven years; I have owned property in Archer County since 1890. At the present time I own fourteen thousand and eighty acres of land situated principally in the East and Northeast part of the County. East of the Wichita Falls and Southern tracks and with the exception of possibly two thousand acres, it is all North of the Wichita River. [fol. 113] I farm about two hundred acres of this land and the remainder is grazing land. I have been engaged in stock raising down there thirty-seven years. My ranch house is about four miles East of the Wichita Southern tracks and about a mile and a quarter North of the Little Wichita River. In going from my home in Wichita Falls to my ranch I usually take the Lake Creek road that goes through the Lake Creek settlement. My ranch house is seven or eight miles from the Southwest Trail. I very seldom use the Southwest Trail in going to Archer City; I usually go to Scotland and then to Archer City. My ranch is about ten or twelve miles from the Ozark Trail. I have not been over the Ozark Trail for many years. The paving or improving of the Southwest or Ozark Trails would not benefit my property or enhance its value in any degree whatever. I know of no property North of the Wichita River and East of the Wichita Southern tracks that could possibly be benefited in any way by the improvement of these roads. I am acquainted with Jas. E. Dale and I know where his ranch is in Archer County; it is on the line of Archer and Clay County, ten miles along [fol. 114] the line, about a mile and a quarter of the land is in

Archer County and the balance in Clay. His ranch is further from either of these roads than mine and would be benefited even less, if possible, than mine by the improvement of these roads. At the present time Mr. Dale is in California, he is in the cattle business, five or seven hundred acres of his land is in cultivation.

B. D. SARTIN, County Judge of Wichita County, Texas, testified: I am familiar with the reasonable cost of building good roads in this country. I am familiar generally with the territory between Wichita Falls and Archer City, the territory around the old Meridian Highway and the Ozark Trail. I don't think a graveled road could be built between Wichita Falls and Archer City for $5,000.00 a mile. I do not think it could be built for $6,000.00 a mile. It would cost at least ten to $12,000.00 a mile. A concrete road over that territory would cost at least $30,000.00 a mile. A macadamized road $18,000.00 to $20,000.00 a mile; an asphalt road with graveled base fifteen to $18,000.00 a mile. These are the type of roads customarily built in this country. We have all of these types in Wichita [fol. 115] County. The Ozark Trail could be built with a little less grading and with probably fewer culverts and bridges than the Southwest Trail or the Meridian Highway. I think the Federal Government and State under certain restrictions will furnish aid on a graveled road, but I am not an expert on that matter. I have only had some dealings with those departments. They all insist on you building a higher type of road and will give you better inducement for a more permanent road. They insist that you build something that will stay there and get your money's worth, instead of blowing away the first sand storm.

SUMMARY EVIDENCE OF PETITIONERS

Forty-five of the seventy-four signers of the petition for road district No. 2 were called as witnesses and their testimony may be summarized as follows: Five whose names appear did not sign the petition, it having been signed either by a husband or wife. Five only read the petition; four did not know what roads were to be built or consider that question at all; three knew what roads were to be built; five knew the area of the district; thirty did not know or consider what territory the district was comprised of; twenty-eight did [fol. 116] not read the petition; one signed without any explanation of the petition whatever; one knew the Ozark and Southwest Trails were to be improved; fifteen were merely interested in getting good roads; four did not know or think that the East side of the County was included in the district; six considered the East side of the County would be benefited by the road; three did not consider the question of benefits at all and thirty-three testified that they were only interested in getting a good road from Wichita Falls to Archer City and only understood that that road was to be built.

[fol. 117] IN UNITED STATES DISTRICT COURT

JUDGE'S CERTIFICATE TO STATEMENT OF EVIDENCE

Watkins & Walsh, Solicitors for Complainants.

On this day, came on for consideration the matter of approval of the statement of the evidence lodged by the Complainants, and it appearing to the Court that 10 days' notice of this hearing has been given to the defendants, as required by Equity Rule 75, and it further appearing that such statement is true, complete and properly prepared; it is ordered by the Court that the same be and is hereby approved as part of the record herein, for the purposes of the Complainants' appeal to the Supreme Court of the United States.

Dated this 17th day of January, 1925.

Wm. H. Atwell, Judge of the United States District Court, Northern District of Texas.

[fol. 117½] IN UNITED STATES DISTRICT COURT

DECREE—December 23, 1924

On this 23rd day of December, 1924, this cause came on to be heard by consent and agreement of all the parties, at Dallas in said District, and the Court having heard the same and being fully advised in the premises; it is ordered, adjudged and decreed by the Court that the complainants take nothing by their suit herein and that the Defendants will go hence without day with their costs, for which let execution issue. To which action and ruling of the Court, the Complainants except.

Wm. H. Atwell, United States District Judge, Northern District of Texas.

OK'd. Watkins & Walsh, Attorneys for Complainants. W. E. Forgy and Jno. R. Moore, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed January 17, 1925

To said honorable Court:

The Complainants in the above entitled and numbered action, feeling themselves aggrieved at the decree of this Court herein entered on the 23rd day of December, 1924, in favor of the Defendants, hereby pray the allowance of an appeal therefrom to the Supreme Court of the United States for the correction of the errors therein as specified in the accompanying assignment of errors, and that justice may be done.

Watkins & Walsh, Solicitors for Complainants.

[fol. 118] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Ordered that the foregoing claim of an appeal be and the same is hereby allowed this 17th day of January, A. D. 1925, at Dallas in said District.

Wm. H. Atwell, United States District Judge, Northern District of Texas.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed January 17, 1925

Now comes the Complainants and assign the following errors to be urged on their appeal from the decree entered in this cause to the Supreme Court of the United States, to-wit:

I

The Court erred in decreeing the Statute of Texas authorizing the creation of defined road districts, as set out in the complaint, does not conflict with the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

II

The Court erred in decreeding that the proceedings of the County Commissioners' Court whereby a tax was levied upon the property of the Complainants by Road District No. 2 of Archer County, Texas, does not deprive them of their property without due process of law and afford them the equal protection of laws guaranteed under the Fourteenth Amendment to the Constitution of the United States.

III

The Court erred in entering a decree in favor of the Defendants and in refusing to perpetually enjoin the taxation of their property for Road District No. 2 of Archer County, Texas.

[fol. 119] Wherefore, complainants pray that the decree of the District Court of the United States for the Northern District of Texas, entered herein, be reversed.

Watkins & Walsh, Solicitors for Complainants

[fol. 120] BOND ON APPEAL FOR $750.00—Approved and filed Jan. 17, 1925; omitted in printing

IN UNITED STATES DISTRICT COURT

OPINION—Filed December 31, 1924

Final hearing to enjoin officers of Archer County, from levying, assessing and collecting taxes for the year 1924 for the completion of an highway in that county, on the ground that the state statute under which the tax was levied is unconstitutional.

Watkins & Walsh, Wichita Falls, Texas, for the plaintiffs
W. A. Keeling, Attorney General of Texas, Frank M. Kemp, and C. F. Gibson, Assistant Attorneys General, Austin, Texas; John R. Moore, and, W. E. Forgy, Archer City, Texas, for the defendants.

[fol. 121] Plaintiffs reside in Wichita County, Texas, and complain of the county commissioners' court of Archer County, Texas, and of the tax assessor and tax collector of that county. They allege that the commissioners' court, acting upon a petition of seventy-four resident tax paying voters created road district number two of Archer county, which comprises, approximately, the north half of the county and includes property owned by the plaintiffs. That said court, called an election to be held in that district for the purpose of determining whether five per cent interest bearing bonds, in the sum of $300,000.00 should be issued, and, whether a tax should be levied annually upon all the property in said district for the purpose of creating a sufficient sinking fund for such bonds. That an election was held at which 303 votes were polled for such proposition and an hundred and two against. That appropriate orders for levying, assessing and collecting the ad valorem tax were issued; that such tax for the year 1924 was fixed at 43 per cent per $100 valuation.

That the property owned by the plaintiffs lies along the east side of Archer county, and would not be benefited by the proposed roads. That the building thereof would make it impossible, legally, for thirty years, for the plaintiffs to have created any other road district which would afford them benefit, or, relief, and, that they would be compelled to pay taxes for the construction, maintenance and operation of the system of roads adopted by the officers of Archer county when they were not receiving any benefit therefrom.

That the property owners of the district were afforded no hearing upon the question of benefit. That the road district was created in pursuance of a conspiracy between defendants, excepting one, against the plaintiffs.

That the creation of such district, and, the election thereon, and, [fol. 122] the subsequent proceedings for taxation were had under authority of Section 52 of Article 3 of the constitution of Texas, and, under the provisions of articles 937 to 641, inclusive, Vernon's Texas statutes, 1920. That section 637 d thereof provides that when a defined road district has been established and bonds issued no de-fined road district shall thereafter be created or established overlap-

ping same or embracing any part thereof while any of the original bonds are outstanding and unpaid.

That the statute and proceedings and the tax levied in pursuance thereof are violative of the Fourteenth amendment, and, of article 3 section 53 of the constitution of Texas, in that the plaintiffs' property was arbitrarily and capriciously included in said district; and, in that no notice was given to the plaintiffs of an opportunity to be heard upon the question of benefit to their property; and, in that the tax levied upon the plaintiffs was entirely disproportionate to the benefit. That the amount involved is approximately 40,000.00.

Temporary and permanent injunctions were prayed.

The defendants answered denying a violation of the Fourteenth amendment; and, denied that there was any conspiracy.

No temporary injunction was sought, but, all parties proceeded to take testimony and the case is before me for a final hearing which, in this character of a suit, may be had before one judge, even though, had a temporary injunction been pressed for, it would have been necessary to have had such hearing before three judges.

The testimony presented by the record fairly supports the allegations of fact made by the plaintiff, except in so far as the conspiracy is concerned. As to that it may be assumed that the defendants sought to create such a district as would result in the present condition.

[fol. 123] 1

The plaintiffs claim that the cause is ruled by that line of decisions which do not permit the collection of a tax for a certain sort of improvement unless there is a direct benefit shown to the property against which the levy is made.

The defendants maintain that the case comes within those decisions and principles which authorize taxation upon the theory of a general theoretical benefit regardless of benefits which may be immediately figured.

That statute that is challenged is as follows:

"Power to issue road, Etc., Bonds and Levy tax for Interest and Sinking Fund. Any county in this state, or any political subdivision or defined district, now or hereafter to be described and defined, of a county, is hereby authorized and empowered to issue bonds, or otherwise lend its credit, in any amount not to exceed one-fourth of the assessed valuation of the real property of such county, or political subdivision, or defined district thereof, and to levy and collect such taxes to pay the interest upon such bonds and provide a sinking fund for the redemption thereof, for the purpose of construction and maintaining and operating mecadamized, graveled or paved roads and turn-pikes, or in aid thereof.

(Acts 1909, p. 186; Acts 1907, p. 251; Acts 1909, S. S. p. 271.)

This legislation was authorized in a constitutional amendment adopted by the people of Texas.

The foregoing statute and the statutes authorizing the entire

procedure, show that there is no machinery for a hearing and a determination of the question of benefits to the property comprised within the proposed district. There is no machinery for the fixing of the bounds of the proposed district.

[fol. 124] If the taxes in question are what we call "local assessment," or, "special taxes," then, and, in that event, it is imperative that an opportunity to be heard before some board, some tribunal, some determining authority, shall be granted.

Turner vs. Wade, 254, U. S. 64;
Londoner vs. Denver, 210 U. S. 373;
Embree vs. Kansas, 240 U. S. 242;
Norwood vs. Baker, 172 U. S. 269;
Frank vs. Barber Asphalt Co., 181 U. S. 324;
Swight vs. Davidson, 181 U. S. 371;
Fallbrook Irrigation District vs. Bradley, 164 U. S. 112;
Spencer vs. Merchant, 125 U. S. 345;
Hagar vs. Reclamation District, 111, U. S. 701;
Paulsen vs. Portland, 149 U. S. 30;
King vs. Portland, 184, U. S. 61.

The same cases sustain the proposition that when a taxing district for local improvements is not created by the legislature there must be a determination by some responsible, disinterested board or municipality, under rules prescribed by the legislature.

I believe that the act of the legislature itself created the district and fixed the tax. It provides that any county, or, "any political subdivision," or "defined district" * * *" is hereby authorized and empowered to issue bonds." Certainly any county would not be challenged. The facts show that the road district in dispute was composed of two of the precincts of Archer County; "political subdivisions" of the county well recognized and ascertained long before the controversy. The tax rate fixed in the act is. "in any amount not to exceed one-fourth of the assessed valuation of the real property of such "county," or "political subdivision," or, "defined district" thereof. The sole question then is whether the rule announced in the foregoing cases is applicable here. If the building of roads is [fol. 125] of general benefit—the fruit of general taxation—rather than of "local assessments," or, "special taxes"— no determination of benefit was necessary, because the people, in the consitution, and, in their legislative wisdom had already declared such benefit.

It may be said to be conceded by legal reasons that special assessments for local improvements, even though referable to the taxing power, are not taxes for public purposes, or, taxes at all, within the purview and sense of the constitutional provision.

There are burdens that the particular community, or voters assume, that they, in direct turn, may be benefited in personal comfort or increased property value. Such benefits are demonstrable. They may be photographed. They are not "guessed" into existence. They must be shown. Hearings are provided, and, graduation of the tax is frequent.

The recent case of Kansas Southern vs. Road Improvement Dis-

trict, by the U. S. Sup. Ct., Dec. 15th., 1924, was in this class, until the legislature, by special act, recognized the creation and boundary of the districts that were there in dispute, and, approved the plans and confirmed the assessments. That act may be said to have removed the improvement from the local class to the general class. And, if that was not the effect of the legislative approval then the act of the legislature may be said to have finally determined the benefits, behind which action the courts would not go, unless the action was manifestly unreasonable and discriminative.

Not so with a general tax. Benefit is presumed. People without children pay school tax that other children may go to school. People without means of locomotion pay a road tax, and, a street tax that other people may ride on the road and on the street. Such taxes are a part of civilization's toll. It is sometimes difficult to trace the line of difference between the two sort of taxes, especially [fol. 126] when one seeks to review the cases where such questions have been adjudicated.

Where the state constitution is not an obstacle the legislature of a state may provide that the cost of a local public improvement, such as a public road, shall be distributed over the lands particularly benefited any may, itself, determine what lands will be benefited, and, therefore, what propostion of the tax shall be paid. Such action will not be disturbed unless it is palpably arbitrary and a plain abuse of power, for if such it would run counter to the Fourteenth amendment.

Kansas Southern vs. Road Improvement District, U. S. Sup. Court, December, 1924.

In Missouri Pacific vs. West Crawford Road Improvement District, the Supreme Court, November 17th, 1924, 45 Sup. Ct. Rep., 31, following out this line of thought, determined that the Fourteenth amendment is not violated by levying the cost of preliminary inquiry into whether a road improvement should be made in a certain district on property therein according to its value, though such tax would exceed any benefits that would have been received by making the improvement, and, though the road project is abandoned; adding, that there must be a flagrant abuse, or purely arbitrary exercise of the taxing power by state authorities before it will be held that the due process of law clause of the constitution is violated.

It may be conceded that a legislative act which provides for the levy of taxes for local improvements, according to the value of the property affected, is not arbitrary.

Mattingly vs. District Court of Columbia, 97 U. S., 687;
Fallbrook Irrigation District vs. Bradley, 164 U. S. 176;
Bauman vs. Ross, 167 U. S., 548;
Webster vs. Fargo, 181 U. S., 394;
Houck vs. Little River District, 239 U. S., 254.

[fol. 127] The levee district law of the state of Texas has been upheld by the appellate courts of Texas, by the same reasoning.

Dallas County Levee District vs. Looney, 109 Tex. 326;
Holt vs. State, 176 S. W. 743;
David vs. Timon, 183 S. W. 88;
Ogburn vs. Barstow, 230 S. W. 1036;
Wharton vs. Higbee, 149 S. W. 381;
T. P. vs. Ward, 112 Tex., 593.

But the statute under consideration cannot be defended upon the ground that there was any consideration by the local officers of the benefits to be derived from it by the tax payers. There was no hearing to determine such matter and the record in this case discloses an utter lack of such consideration. The statute must, therefore, be upheld, if at all, as general taxation, as distinguished from local taxation or special assessments. That this difference is well marked will be found in a study of,

McQuillin on Municipal Corporations, vol. 8;
Eubank vs. Fort Worth, 173 S. W. 1003;
Ranney vs. Cape Girardeau, 164 S. W. 582;
City of Perry vs. Davis & Younger, 90 Pac. 871;
Fallbrook vs. Bradley, 164 U. S. 176;
(case where a hearing was provided)
Kelly vs. Pittsburgh, 104 U. S. 78;
(general system of taxation is "due process")
Wight vs. Police Jury, 264 F. 705.

The legislature considered—the people decided—that a road was a general benefit. We must concede that the people and the legislature both knew that the building of a county road through the middle of the county, would not, directly, affect—benefit, alike, all of the property in that county. Yet all property was taxed alike. May we say that the legislature was wrong—was arbitrary—was [fol. 128] confiscatory?

May we say that what was done in the instant case was "palpably arbitrary and a plain abuse."

I think not.

The case of Wight vs. Police Jury cited above, by the circuit court of appeals for the fifth circuit, is almost identical with the case here. The police jury, under constitutional permission, fixed the road districts. There was no hearing. A master found that the road would injure the railroad, whose property was made the center of, and ran the entire length of the district. The court held, that there was no denying of due process, and, that the construction of the road was for the general good and the expense could be met by a general tax, and, that the fact that some persons may pay small taxes and receive great benefit, and, others pay large taxes and receive limited benefits, is not such an inequality as will authorize a constitutional cognizance.

The people of Texas adopted the constitutional provision authorizing the procedure that was followed in this case. The road

district was created in accordance with the act of the legislature under such constitutional amendment. The voters carried the election for such improvement and the tax was levied upon all property in that district exactly alike.

The injunction is denied and the bill is dismissed.

Order will be drawn accordingly.

Wm. H. Atwell, United States District Judge.

[fols. 129 & 130] In United States District Court

Clerk's Certificate

United States of America,
Northern District of Texas,
Wichita Falls Division, ss:

I, Louis C. Maynard, Clerk of the District Court of the United States for the Northern District of Texas, do hereby certify and return to the claim of appeal of Perry Browning, Wm. Coleman, James E. Dale, J. T. S. Gant, and G. W. Edgin, in a suit pending in said court, wherein, they are complainants and E. M. Hooper, E. A. McDonald, E. L. Bishop, E. A. Herndon, C. S. Morris and C. E. Goodwin, are defendants, that the above and foregoing is a true copy of all papers filed and proceedings had and entered in said cause, according to the præcipe made, duly served and filed herein, as the same appear on file and of record in my office; excepting only the Citation on Appeal and Service thereof, filed January 20, 1925, the original of which is transmitted herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Wichita Falls, in said District, this the 21st day of January, 1925, and the independence of the United States the one hundred and forty ninth.

Louis C. Maynard, Clerk of the United States District Court for the Northern District of Texas by R. E. Murphy, Deputy. (Seal of the U. S. District Court, Northern Dist., Texas, Wichita Falls.)

[fol. 131] Citation—In usual form, showing service on Jno. R. Moore and W. E. Forgy; filed Jan. 21, 1925; omitted in printing

Endorsed on cover: File No. 30,830. N. Texas, D. C. U. S. Term No. 256. Perry Browning, Wm. Coleman, James E. Dale, et al., Appellants, vs. E. M. Hooper, E. A. McDonald, E. L. Bishop, et al. Filed January 26th, 1925. File No. 30,830.

Office Supreme Court, U. S.
FILED
OCT 31 1925
WM. R. STANSBURY
CLERK

NO. 256

in the

Supreme Court of the United States

OCTOBER TERM, A. D. 1925

PERRY BROWNING, ET AL.
Appellants.

VS.

E. M. HOOPER, ET AL
Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF TEXAS

Reported Volume 3, Federal Reporter (2nd Series) 160-163

APPELLANT'S BRIEF

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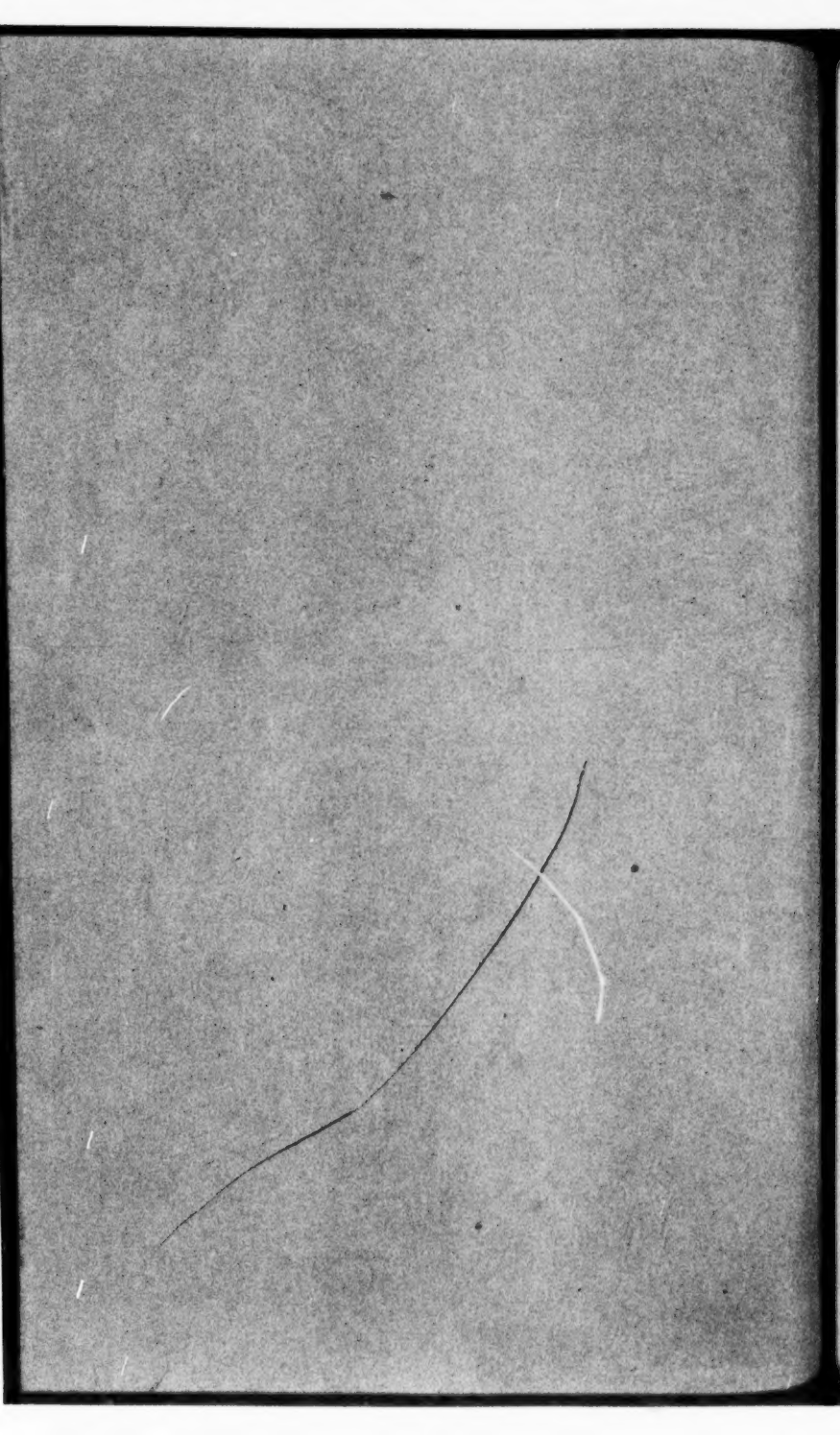

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NO. 256

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OCTOBER TERM, A. D. 1925

PERRY BROWNING, ET AL
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VS.

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Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF TEXAS

Reported Volume 3, Federal Reporter (2nd Series) 160-163

APPELLANT'S BRIEF

WM. R. WATKINS
C. K. WALSH,
Attorneys for Appellants,
Wichita Falls, Texas.

GROUNDS OF JURISDICTION.

This suit was instituted in the District Court and proceeded to final decree on the 23rd day of December, 1924, (R 28). The only issue raised was whether the statutes of Texas and proceedings of appellees thereunder, under which the appellants property was sought to be taxed, are in controvention of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. The decision below being in favor of their constitutionality, this appeal is prosecuted directly to this court under Section 238 of the Judicial code, providing,

> "Appeals * * * may be taken from the district court * * direct to the Supreme Court * * * in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

The case of McMillan Contg. Co. vs. Abernathy, 263 U. S. 438-443, 68 L. Ed. 378, and authorities there cited sustain the appeal.

The case is reported below in 3 Federal Reporter (2nd series) 160-163.

STATEMENT OF THE CASE

The appellants, four of whom reside in Wichita County, Texas, and one in Archer County, Texas, instituted this suit against appelles, County Commissioners, Tax Assessor and Tax Collector of Road District No. 2 Archer County, Texas in the District Court to enjoin the levy, assessment and collection of a tax upon their land to pay a part of the cost of improvement of certain public highways in Archer County, Texas, on the ground that the levy assessment and collection of the tax, and the law authorizing the same, deprived them of their property without due process of law and denied them the equal protection of laws guaranteed under the Fourteenth Amendment to the Constitution of the United States. As the District Court found that the allegations of the bill of complaint, except the allegation of a wrongful conspiracy, were fairly sustained by the evidence, and as to the conspiracy found the defendants undertook to create the situation revealed by the record, we will confine our statement of the case to the facts without repeating both the pleadings and evidence, except as may hereafter be noted in argument.

As the law under which the proceedings for the taxation of complainants' property were had was formally complied with, we will state the steps taken by the defendants thereunder, leaving it to be assumed the law required and authorized what was done.

On the 17th day of January, 1924, seventy-four inhabitants of Archer City, Texas, denominating themselves resident property tax payers, presented their petition to the Coun-

ty Commissioners' Court of Archer County, Texas. In this petition they defined, by metes and bounds, a territory some thirty miles wide (East and West) and fifteen miles long (North and South) as Road District Number 2, Archer County, Texas, and prayed, first, the recognition of the territory described therein as a "defined road district" and, second, that the court call an election to be held in said District, at which the property tax-payers residing in the district could vote, for the purpose of determining (a) whether or not $300,000.00 of bonds of the district should be issued for the purpose of constructing, operating and maintaining macadamized, graveled or paved roads or turnpikes, or in aid thereof, and, (b) whether or not a tax should be levied on all the taxable property of the district, subject to taxation, for the purpose of liquidating the principal and interest on said bonds as they mature. (R. 14, 37).

Immediately upon presentation of said petition, and without any notice to the property owners or hearing being afforded them, the Commissioners' Court granted the petition and entered an order recognizing the territory defined therein as Road District No. 2 of Archer County, Texas (R 37, 38, 44). At the same time an order was entered designating the roads that would be constructed, operated and maintained with the proceeds of the bonds in the event the election prayed for resulted in favor of the issuance thereof, the order reciting, in this conncetion, that such roads were desired by the petitioners, and a majority of the voters in the district (R 38). The roads so designated are from 6 to 25 miles from appellants' property. The appellants' property lies along the east-

ern boundary line of the county. One of the roads to be improved, known as the Southwest Trail, comes into the County six miles West of the Northeast corner thereof, runs in a Southwesterly direction about eight miles, at which point it is 12 miles from the Eastern boundary line of the county, and runs from thence, South 12 miles to Archer City, the County Seat. Another road, known as the Ozark Trail, comes into the county on its North line about 17 miles West of the Northeast corner of the county and proceeds in the Southwesterly direction to the West boundary line of the county, about 18 miles. There are also two six mile roads, one in the Northwest corner of the county and one joining the Ozark Trail and Southwest Trail in the North part of the County. All the roads converge on Wichita Falls, the market center of the country—about six miles north of the complainants' property. (See plat and R. 7, 8, 38).

At the same time this order was entered, another order was entered calling an election which was duly held and carried in favor of the issuance of the bonds and levy of the tax by 33 votes. (R. 3, 4, 13, 38). The Commissioners' Court, thereupon, without any hearing or notice to the tax-payers, authorized the issuance of the bonds, levied a tax of 43c on the $100 valuation of all taxable property in the District, for the year 1924, and provided for the levy each year, for 28 years, thereafter of a tax sufficient to liquidate the bonds as they mature. The tax was certified to the Tax Collector, who, having received the tax rolls of the county for general tax purposes, levied the aforesaid 43c against all property of the complainants at the same valuation used for State and County pur-

poses (R. 38). Appellants' property is so situated with reference to Wichita Falls, and the country served by the roads hereinbefore mentioned, that the construction, operation and maintenance of them would be of no benefit whatever to their property, but on the contrary the establishment thereof would result in depriving them of the right to improve the existing roads through their part of the district for 30 years, because the land included in said road district could not be incorporated into another road district, and about nine-tenths of the voters of the district reside in the Northwest part of the county, along the Ozark Trail and at the Southern Terminus of the Southwest Trail, Archer City. (R. 47, 51, 52, 53, 56).

The appellees, in their answer and testimony, admit that there was no hearing or notice at any stage of the proceedings before the tax became irrevocably fixed, but justify this by pretending that upon the presentation of the petition for the creation of said road district, it becomes the mandatory and ministerial duty of the court to recognize the district as defined, order the election, issue the bonds and do all other things incident thereto. (R. 26, 49).

The petitioners for the Road District, with the exception of one, reside in Archer City (R. 42). Forty-five of them testified in the case; five whose names appear did not sign the petition; five only read the petition; four did not know what roads were to be built or consider the question at all; three knew what roads were contemplated; thirty did not know of what territory the district was comprised; twenty-eight did not read the petition; one signed without any explanation whatever and thirty-three testified they were interested only

in getting a good road from Wichita Falls to Archer City. The petition was merely circulated. (R. 57).

The appellants alleged substantially, that the statutes authorizing and the foregoing proceedings thereunder for the establishment of Road District No. 2, Archer County, Texas, deprive them of their property without due process of law, and deny them the equal protection of laws, guaranteed by the Fourteenth Amendment to the Constitution of the United States:

1st. Because the tax authorized thereby is a special assessment and must be laid according to benefits. It was levied in this case wholly without consideration of this question.

2nd. Because the law is confiscatory, the Legislature undertakes to delegate to private individuals its power to irrevocably select property to be taxed creating and fixing the boundaries of a taxing subdivision of the state.

3rd. Because at no stage of the proceedings before the tax becomes irrevocably fixed, is there any notice to or opportunity afforded the property owner to object to the taxation of his property. (R 40)

The court below held that the tax was a general tax that need not be laid with reference to benefits upon the property in the district! that the Legislature itself selected the property to be taxed; and, that no notice or opportunity to be heard before the tax became fixed was necessary, and denied the complainants relief.

At the time of the allowance of the appeal, the appellants

filed the following assignment of errors and prayer for reversal, to-wit:

I

The court erred in decreeing the Statute of Texas authorizing the creation of defined road districts, as set out in the complaint, does not conflict with the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

II

The court erred in decreeing that the proceedings of the County Commissioners' Court whereby a tax was levied upon the property of the complainants by Road District No. 2 of Archer County, Texas, does not deprive them of their property without due process of law and afford them the equal protection of laws guaranteed under the Fourteenth Amendment to the Constitution of the United States.

III

The court erred in entering a decree in favor of the defendants and in refusing to perpetually enjoin the taxation of their property for Road District No. 2 of Archer County, Texas.

WHEREFORE, complainants pray that the decree of the District Court of the United States for the Northern District of Texas, entered herein,be reversed.

SPECIFICATION OF ERRORS.

I

The decree below is erroneous in holding the tax sought to be enjoined a "general tax" levied as for ordinary governmental purposes, because under the law it is a "special assessment for the cost of a public improvement" which must be laid in accordance with some recognized scheme of establishing the district, and determining the benefits, and, it being admitted the tax was actually laid without consideration of these questoins at all, the appellants are deprived of their property without due process of law and are denied the equal protection of laws guaranteed under the Fourteenth Amendment to the Constitution of the United States.

II

The Legislature of Texas, by the law in question, undertook to delegate to private individuals its power to create a taxing district in the state for the purpose of providing for the payment of the cost of improvement of public highways, by permitting the petitioners for the district to irrevocably select the property to be taxed, and in substance determine the amount of the tax, thereby depriving the appellants of their property without due process of law and denying them the equal protection of laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, and the decree of the District Court to the contrary is erroneous.

III

At no stage of the proceedings, before the tax on appellants' property became fixed was there any notice given to or opportunity afforded them of a hearing upon the imposition of this assesment on their property, which is essential, that they not be deprived of their property without due process of law, and the decree of the District Court to the contrary is erroneous.

SUMMARY OF ARGUMENT

I

Under the Revised Statute of Texas, 1920, Article 627-641, a petition defining any part of a county is presented to the county commissioners' court by fifty or more resident property tax-paying voters of the district, the court is thereupon mandatorily required to recognize the district defined in the petition and order an election for the purpose of permitting the voters of the district to determine whether or not bonds thereof shall be issued for road purposes and a tax levied to pay the same. If the bond election is carried by two-thirds majority of the votes cast the bonds are immediately issued by the court and a tax is levied at the same time to liquidate them. In the performance of its duties thereunder, the commissioners' court acts in a purely ministerial capacity.

There is no notice or hearing on the proceedings at which the property owners can be heard before the tax becomes irrevocably fixed. The doors of the courts are closed against the citizens—the proceedings of the commissioners' court are

not subject to attack for fraud or abuse of discretion; the action of the petitioners in defining the district in their petition is not subject to attack for fraud or abuse of discretion or because the property included therein is not benefitted; the election cannot be enjoined, nor can it be contested on account of the invalidity of the law under which it was held, and, after it has carried the district becomes a municipal corporation whose existence can only be attacked by the state in a quo warranto proceeding and not otherwise.

The tax imposed on the appellants' property under a district established under the foregoing law and proceedings had thereunder is of that class denominated "special assessments" because it is levied by a municipal corporation covering a limited area and created for the sole purpose of supporting the specific public improvement for which the tax was levied; it is not a general tax levied by the state as for general governmental purposes.

In this case there was no consideration of the question whether any property included in the road district in which appellants' property was taxed was benefited or not by the proposed improvement and, the law permitting this, is void. The whole theory underlying the law of special assessments is that in the exaction thereof it is assumed that there has been a legislative determination that the portion of the community upon which they are laid is peculiarly benefited by the improvement. The principle applies as well to districts created by the legislature as to those created under delegated authority.

II

A state legislature cannot abdicate its power of taxation by delegating to private citizens the authority to fix the boundaries of and establish a taxing district, because this is a legislative question requiring deliberation by the legislature or under its direction. Due process requires that the powers vested in the government be exercised by the government and not by private individuals.

These principles apply to the establishment of special assessment districts for public improvements to the same extent they have been applied to cases arising under the police power, in which it has been held by this court that the Fourteenth Amendment is violated by vesting arbitrary power in private individuals to determine whether a business may be conducted in a certain locality or not, and, by vesting arbitrary power in private individuals to establish a property line.

No law for the establishment of a special assessment district, other than by a legislative body without notice or hearing has ever been held constitutional.

A law permitting petitioners to irrevocably define and establish a taxing district is of such a nature, as that there is no reasonable probability that justice generally will be done in its application.

III

Where a taxing district is not established by the legislature, but under its delegated authority, it is essential to due process, that those affected thereby be given notice and an op-

portunity to be heard upon the question whether their property would be benefited by the improvement or not.

The cases in this court fall into three classes: (1) Those in which the power of establishing the district being vested in the legislature, the district is established by the legislature—when no notice or hearing is essential, (2) those in which the organic law vests the legislative power directly in a subordinate agency. In these two classes the law is always sustained unless it appears that there is no reasonable presumption that substantial justice will be done, but the probability is the parties will be taxed disproportionately to each other and to the benefits conferred. The third class comprehends those cases in which the district is not established by the legislature but by an exercise of delegated authority (as in this case) and therefore in the location of the boundaries and the creation of the district it is essential to due process that the owners be accorded an opportunity to be heard.

The district involved in this suit was established in 1924 under a general prospective law adopted by the legislature of Texas in 1909 and under that law is a "defined district." The record does not show that it is a "political subdivision."

ARGUMENT

I

The law provides for the levy of special assessments as distinguished from general taxes.

At the outset we shall consider the law and its interpretation by the Texas Courts.

The Statutes, under which these proceedings were had and which, together with the said proceedings are attacked as violative of the Fourteenth Amendment, are set out in an appendix hereto pp. 69-80.

The method of taxation authorized by these statutes is this:

A petition under Art. 628 (appendix 69) defining any portion of a county the petitioners may select, as a Road District, is presented to the County Commissioners' Court of the County by fifty or a majority of the property tax paying voters residing in the district defined, praying the recognition of the district and for an order of the Court calling an election for the purpose of determining (a) whether or not the bonds of the District shall be issued in any amount not to exceed one-fourth of the assessed valuation of real property of the district, and (b) whether or not a tax shall be levied on all property of the district subject to taxation to pay the interest on and redeem the bonds at maturity.

In Moore vs. The County Commissioners' Court of Bell County, 175 S. W. 849, the court interpreted the Statute under consideration, thus:

> "In using that language in the statute (Art. 628) no doubt the legislature was aware of the fact that whenever it was sought to obtain its benefits in order to accomplish that result, it would be necessary for a petition to be presented to the Commissioners' Court describing

the proposed territory, and it would also be necessary for that Court, in ordering the election to give the same description that was given in the petition. Now, when that has been done, then the district has been described and defined by the Commissioners' Court by an order entered upon its minutes; and it is probable that in enacting the statute the legislature intended that the district should be so defined and described by the Commissioners' Court. **Neither the constitution nor the legislature designated the mode and manner by which other districts should be described and defined; and when the Legislature passed the law making it the duty of the Commissioners' Court upon proper application, to order an election to be held in any defined district now or hereafter to be described and defined and does not designate any other officer or person to describe and define it, it seems reasonable to conclude and we hold that it was intended that the Commissioners' Court should do so."**

The Statute imposes on the Commissioners' Court the mandatory duty of allowing this petition at any regular or special meeting thereof, by recognizing the establishment of the territory defined in the petition as a road district and ordering an election to be held therein for the aforesaid purposes.

In Huggins vs. Vaden, 253 S. W. 877, 259 S. W. 204 (1923) a case in which the Supreme Court of Texas refused a writ of errer thereby making the judgment and determination of the questions involved final so far as the highest courts of Texas are concerned, the Court of Civil Appeals at Fort Worth held that under the statutes in question (Chapt. 2, Title 18, Art. 627-641 R. C. S. of Texas).

"Any defined district of any county is authorized

and empowered to issue bonds in an amount not to exceed one-fourth of the assessed valuation of the real property situated in such district and to levy and collect taxes to pay off said bonds for the purpose of constructing and maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof, within the boundaries of said defined district. By other provisions of the same chapter, the right to issue such bonds is made dependent upon the votes of two-thirds of the resident property tax paying voters in said district; and before an election can be ordered by the Commissioners' Court for the issuance of such bonds, a petition must be presented and filed with the Commissioners' Court signed by at least fifty of the resident property tax paying voters of the district. **By Article 628 of that Chapter, it is made the duty of the Commissioners' Court to order such election whenever such a petition so signed is presented. * * * The petition (for the road district under consideration in that case) described the road district to be so created by metes and bounds, and all of the signers of the petition resided within those boundaries. * * * We have no doubt that as a general proposition the Commissioners' Court has no discretion to refuse, to hear and grant a petition to establish a road district and to order an election for the purpose of determining whether or not bonds shall be issued for road purposes, whenever such a petition is prepared and presented in compliance with the provisions of Chapter 2, Title 18, of the Statutes and that a mandamus will lie to compel the performance of such duty whenever necessary.** That conclusion is well sustained by the following decisions of this state:

Sansom, Mayor, etc. vs. Mercer, 5 S. W. 62, Tex. 488.
Kimberly vs. Morris, 31 S. W. 808, 87 Tex. 637.

Ferguson vs. Leigh, 193 S. W. 206.
Boynton vs. Brown, 164 S. W. 893.
Moore vs. Kaufman, 200 S. W. 374.

In this case two petitions had been filed for the creation of a road district in Clay County, Texas, one petition two days prior to the other. The boundaries defined in the second petition overlapped to some extent the boundaries defined in the first petition. The petition first filed was first considered by the Commissioners' Court and granted and when the second petition was presented it was refused, because of the overlapping of the territory defined in the first petition, the statute prohibiting such. The contention was made that the two petitions were of equal dignity and being presented on the same day the boundaries should have been adjusted by the Commissioners' Court so as to remove the overlapping feature, constituting an alleged discrimination against property owners within the boundaries of the second district. The contention was denied by the Court of Civil Appeals in view of the rule quoted with the further remark:

> "It cannot be doubted that the Commissioners' Court did not abuse its discretion in taking up and granting the petition for Road District No. 2, which was the first petition presented, even though they knew that the second petition had been filed. Indeed, we are unable to percieve how it can be said that the Court had any discretion to refuse that petition when it was presented."

In a case in which the appellees here were defendants (Meurer vs. Hooper, 271 S. W. 172) decided January 10, 1925, the Court of Civil Appeals at Fort Worth held with respect to

the Road District under consideration here that, the commissioners' court had no discretion but to grant the petition for Road District No. 2, when presented, to order an election, canvass the returns, and order the issuance of bonds for that district, all of which was done, "and such action being in compliance with statutory requirements, the same cannot, standing alone, be held void for want of lawful authority, or for fraud or for abuse of discretion on the part of the defendants as members of the commissioners' court.

> "By virtue of the statute referred to the resident property tax paying voters in Road District No. 2, had the legal right to petition for an election for the bond issue. Since they had that right no proper charge of fraud can be made for its mere exercise. * * *
>
> "Since the petitioners for Road District No. 2 had the specific statutory right to resort to all the proceedings which led to the creation of that district and to have the bonds issued and the property in that district assessed to pay same, it follows, as a conclusion of law, that their act in so doing can not, at least in an action, such as this, be held fraudulent; and since such acts were lawful the alleged acts of defendants in aiding and abetting those petitioners in their undertaking cannot in this suit be held a conspiracy to wrong the petitioners for Road District No. 1 and other property owners in that district. * * *

In this case the right of the commissioners' court and petitioners to include property not benefited, in a road district, to raise revenue and effectually cut off the unbenefited property from road improvement direfully necessary, and unquestionably desired, for arbitrary and capricious reasons only, was

squarely presented in the petition to which a demurrer was sustained in the trial court, and its ruling met with affirmance in the appellate court in the all inclusive language just quoted. A holding in substance that there is no standard or uniformity required in the selection of property for taxation; and, that the effect of the exercise of this taxing power **by the people,** however onerous, unjust or discrimnatory will not be inquired into by the courts for any reason.

This law of the Texas courts is truly an innovation for it is without parallel in the decisions or texts on taxation.

As this case involves all the proceedings in the formation of the same road district involved in this case, we invite the court's careful attention to it.

Even in an election contest the constitutionality of the law under which the election was held cannot be attacked in the Texas courts.

Bassel vs. Shanklin, 183 S. W., 105.

An action would not lie to enjoin the election because the boundaries of the district were arbitrarily established because prior thereto the property owners could not show any injury.

Gilmore vs. Waples, 188 S. W. 1037.
League vs. Brazoria County Road District, 187 S. W. 1012.

At the election the resident property tax paying voters are permitted to vote. If two-thirds of those voting vote in favor of the proposition, the court is bound to issue the bonds,

levy the necessary tax and at the same time order its assessment and collection. Art. 631. Appendix 71).

The assessor applies the same property valuation on taxable property of the road district as is used for general county purposes, applying thereto the amount of the levy fixed by the Court. Arts. 634, 2827 and 2836. (Appendix 73, 75).

When the assessor has completed his assesment the Commissioners' Court sits as a board of equalization to inspect the assessment made by the assessor and the renditions of the property owner; to correct errors in assessments; and to equalize the tax throughout the county In the process of equalizing values, the board can only classify improved lands into three classes, and unimproved lands into three classes, according to the kind of improvements thereon and the quality of the land . Art. 7564, (3) (Appendix 76) If the valuation of any property rendered or assessed is to be raised, they must give ten days notice to the owner of the proposed raise. There is no hearing provided for in this notice but the court is authorized at any time to produce evidence under oath of property valuations. Art. 7564 (5) (Appendix 78).

After the property valuation has been fixed, it is the duty of the tax collector to collect from the property owner the taxes levied on his property according to the valuation so fixed thereon. Art. 7614 (Appendix 78).

When a district such as outlined above has been established, no part of the territory thereof may be included in in a district established for a similar purpose. Huggins vs. Vaden Supra and Meurer vs. Hooper, supra.

The action of the board of equalization in fixing the value of taxable property is final and will not be reviewed by the courts.

Duck vs. Peeler, 74 Tex. 268, 11 S. W. 1111.
Blewett vs. Richardson, 240 S. W. 529.

By Article 637 of the Statute and the decisions of the highest Courts of Texas (Huggins vs. Vaden, supra) when a petition for a road district has been presented to a Commissioners' Court, recognized, the election ordered and held, the bonds voted and ordered issued, the district becomes a body corporate wihtin the defined limits set out in the petition and the question of the propriety of the inclusion of property in its limits, or the question of benefits will not be examined by the Court.

In the cited case the Court of Civil Appeals held and the Supreme Court refused to disturb the holding, that,

> "Article 637 of the Civil Statutes providing for the creation of these districts, makes the district when so established a body corporate. When the creation of such a district is authorized by statute, and it has been so organized by color of such authority, its corporate existence and the rights thereunder of the trustees or County Commissioners cannot be questioned."

And, applying the rule of El Paso vs. Ruckman, 92 Texas 86, 46 S. W. 26,

> " 'The rule is well established that when the creation of a public corporation, municipal or quasi municipal, is authorized by statute and a corporation has been orga-

nized under the color of such authority, its corporate existence cannot be inquired into in a collateral proceeding. The validity of the incorporation can only be determined in a suit brought for that purpose in the name of the state or by some individual under the authority of the state, who has a special interest which is affected by the existence of the corporation.' "

This from the opinion on rehearing in the case, which it appears was an injunction proceeding by parties owning taxable property in the district, against the County Commissioners' Court, seeking to restrain the issuance, sale and registration of bonds of a road district in Clay County, Texas, organized under Articles 627-641, Compiled Statutes 1920 of Texas. The grounds of the suit alleged were unjust, fraudulent and arbitrary discrimination in allowing the petition for the district within the boundaries therein set forth, which included property of the complainants not benefitted by the proposed improvement, thereby unlawfully taxing their property. The constitutionality of the act was not attacked.

We come then to a consideration of the nature of the tax under this unique law.

Prior to 1904 the County Commissioners' Court of the several counties of Texas had authority to levy a county tax for the purpose of improving the public roads of their respective counties. The amendment to the Constitution in that year was to broaden the power of the legislature so as to authorize it to make provision that any political subdivision of the state, or any defined district, now or hereafter to be described and defined, within the state of Texas, may issue bonds or other-

wise lend its credit, for the purpose of improving rivers, creeks and streams to prevent overflows and to permit navigation or irrigation thereof, or in aid of such purposes; the construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purpose of irrigation, drainage or navigation or in aid thereof, **and for the construction, maintenance and operation of macadamized, graveled or paved roads or turnpikes.** Bell County vs. Hines, 219 S. W., 556. See constitutional provision (Appendix 79). Pursuant to this amendment the law in question, and its amendments have been adopted.

The Legislature has also provided for the establishment of levee districts, conservation and reclamation districts and irrigation districts within the state.

The Supreme Court of Texas, in the case of Dallas County Levee District vs. Looney, 109 Texas, 326, 207 S. W. 310 in treating of this amendment to the Constitution, and the laws adopted pursuant thereto, held that districts created under this constitutional provision were special improvement districts and the taxes levied therein properly denominated "special assessments," which must be laid according to benefits. The decision in this case was later confirmed in the case of T. & P. Railway Company vs. Ward County Irrigation District, 112 Tex. 593, 257 S. W. 333, in which the Court had under consideration the nature of the tax imposed by the Legislature in authorizing the establishment of irrigatoin districts under this amendment to the Constitution. The Court say:

"The power of the State to create such districts and

to tax the property within their territorial limitations to meet the legitimate expenses and debts created by their governing body is not now an open question. No doubt the power inheres in the state to promote and support public improvements of this nature by general taxation without regard to benefits to the property taxed. There is no essenial difference from the view point of public interest therein, between an irrigation system for the purpose of cultivating arid lands, and a drainage system for the purpose of reclaiming swamp or overflow lands * * * **The Courts in the main, while recognizing the public interest in this subject and the governmental power to construct and maintain irrigation and similar projects by means of taxation, have, however, treated such projects when supported by local districts created for that purpose, as belonging to that class of public enterprises commonly known as local improvements, and, while upholding the imposition of a tax on the property owners within the vicinity, have based such holding upon the theory of such benefits as are peculiar to such property by reason of the improvements, as distinguished from those benefits which inure to the public at large.** * * * Treating the law therefore as creating a tax for local improvements to which must be applied the doctrine of special benefit to the property taxed, we have no doubt of the power of the Legislature to include the right-of-way of a railway company within the taxing district and to impose upon the right-of-way an ad valorem tax for the support of the district."

The trial court disregarded these holdings and took the view the tax in question was a "general tax" and could be levied without notice or hearing, although had it been a "special

assessment," under the same circumstances, it would have been void for want of notice or hearing before it became irrevocably fixed on appellants' property. (See 3 Fed. Rep 2nd Series, p. 161-162.).

The error of the lower Court was in attempting to distinguish between "general" taxes and "special assessments," from the nature of the improvement. The holding of the trial judge seems to be that as the construction of roads is of general benefit and may be paid for by the state from general taxation, it follows, a fortiori, that when all or part of the cost of a public road is paid from taxes levied in a district contiguous thereto and established for that purpose, according to the value of the property in the district, the tax is general and not a special assessment. The inherent invalidity of this argument lies in the fact that the state may likewise establish irrigation, reclamation, conservation and drainage systems in particular localities, or defray the cost thereof from general taxation. The Court also overlooked entirely the decisions just quoted from, where a tax apportioned ratably on all property in the district according to value (as here) was held to be a special assessment. Undoubtedly, the Legislature, in adopting this law, knew and considered that the improvement of public roads would promote the public interest as well as enhance the value of contiguous property, but the same is equally true in the establishment of the other projects authorized by the amendment, for anything of a public nature which tends to enhance the welfare of the few is likewise generally of such indirct benefit to the public at large as to justify a general tax. The criterion therefore is not in the nature of the improve-

ment or the method adopted of apportioning the tax. The question is to be determined by a consideration of whether or not the Legislature has undertaken to impose the tax generally on the people ,or has selected, or authorized the selection of particular property in the vicinity of an improvement, the value of which is supposed to be enhanced thereby — — and if the project is supported by a local district created for the purpose, the tax imposed is a special assessment.

The ruling of the Texas Courts is in accord with the decision of this Court in Illinois C. R. Co. vs. Decatur, 147 U. S. 190-209, in which Mr. Justice Brewer, for the Court, said:

> "Between taxes, or general taxes as they are sometimes called by way of distinction, which are the exactions placed upon the citizen for the support of the government, paid to the state as a state, the consideration of which is protection by the state, and special taxes or special assessments, which are imposed upon property within a limited area for the payment for a local improvement, supposed to enhance the value of all property within that area, there is a broad and clear line of distinction, although the proceedings for their collection are by the same officers and by substantially similar methods. Taxes proper, or general taxes, proceed upon the theory that the existence of government is a necessity that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes

which have for their object the welfare of all. 'The public revenues are a portion that each subject gives of his property in order to secure or enjoy the remainder.' * * *

"On the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for the improvement. In Wright vs. Boston, 9 Cush. 233, 241, Chief Justice Shaw said: 'When certain persons are so placed as to have a common interest among themselves, but in common with the rest of the community, laws may justly be made, providing that, under suitable and equitable regulations, those common interests shall be so managed, that those who enjoy the benefits shall equally bear the burden.' In McGonigle vs. Alleghney City, 44 Pa. 118, 121, is this declaration: 'All these municipal taxes for improvement of streets, rest, for their final reason, upon the enhancement of private properties.' In Litchfield vs. Vernon, 41 N. Y. 123, 133, it was stated that the principle is, 'that the territory subjected thereto would be benfitted by the work and change in question.' In Cooley on Taxation (page 416), the matter is thus discussed by the author: 'Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be especially and peculiarly benefitted, in the enhancement of the value of property peculiarly situated

as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies. As in the case of all other taxation, it may sometimes happen that the expenditure will fail to realize the expectation on which the levy is made, and it may thus appear that a special assessment has been laid when justice would have required the levy of a general tax; but the liability of a principle to erroneous or defective application cannot demonstrate the unsoundness of the principle itself, and that which supports special assessments is believed to be firmly based in reason and justice."

The case of Wight vs. Police Jury, 264 Federal 705, cited and relied upon by the District Judge as determining the issue under discussion is not in point. The Constitution of Louisiana vests directly in Police Juries the authority to establish roads and road districts and to levy, assess and collect taxes therein. The police juries, then, under this Constitutional authority, exercise legislative authority. Pursuant to this provision a police jury established a road district including the property of the railroad for which the appellant was receiver. The contention was made that the law and proceedings authorizing the police jury to act in this matter was violative of the

14th Amendment to the Federal Constitution, but it was held not. It is true there are some expressions in the opinion in that case that would indicate the writer believed road districts established for road improvement purposes were distinguishable from irrigation, levee, and reclamation districts, when the tax is levied according to value—because road improvements are of general public benefit. However, the real holding the case is that the people, by their constitution had the right to vest the authority in a police jury to do just what was done in that case—establish a road district without notice or hearing to the parties affected. The ruling is directly in line with similar holdings of this Court. Withnell vs. Construction Company, 249 U. S. 63-73, where the Charter of St. Louis was held to be an organic act under which street improvements could be authorized without hearing or notice before a municipal board; Hancock vs. Muskogee, 250 U. S. 454-459, where the Oklahoma Constitution vests directly in two trustees the authority to establish sewer extension districts without notice or hearing and it was held the guaranties of the 14th amendment were not infringed; and, Goldsmith vs. Construction Company, 252 U. S. 12-18, where the Charter of St. Louis was again before this Court.

Furthermore, in the Wight case, supra, a determination of the nature of the tax was not essential to the decision of the case. The constitution required that the tax be levied according to value and left to the legislative discretion of the police jury the determination of the boundaries of the district. Admittedly, its determination, in the absence of arbitrary action would be sufficient.

The dictum in the Wight case is also subject to the criticism we make of the opinion of the Court in this case in failing to recognize that the legislative authority extends to the construction of public improvements, whether roads, streets, public buildings, schools, ship channels, wharves, irrigation districts, drainage districts, swamp reclamation districts or levee districts, either by general taxation upon consideration of the general public good to be derived therefrom, or, on the other hand from establishing directly or under properly delegated authority, districts for the support of either or all of such projects and the levy of a special assessment upon such property as it may select for the purpose.

Hagar vs. Reclamation District, 111 U. S. 701-715.
Embree vs. Kansas, 240 U. S. 242-251 (road district).
Norwood vs. Baker, 172 U. S. 269-303 (street improvement).
Londoner vs. Denver, 210 U. S. 373 (street improvement).
Milheim vs Moffat, 262 U. S. 710-724 (Tunnel project).
Houck vs. Little River, 239 U. S. 254-262 (Drainage assessment).
Kansas City So. Ry. Co. vs. Imp. Dist. 256, U. S. 658 (Road District).
Thomas vs. Kansas City So. Ry. Co., 261 U. S. 481 (Road District).
Valley Farms Co. vs. Westchester, 261 U. S. 155-163 (Sewer).
Fallbrook vs. Bradley, 164 U. S. 112-179 (Irrigation district).
French vs. Barber Asphalt Co., 181 U. S. 324-370 (Street improvement).

A special assessment can only be laid upon property after due consideration and determination of the benefits, and a law which permits the levy of a special assessment for payment of the cost of a public improvement without regard thereto is void.

The whole theory underlying the law of special assessments is that in the exaction thereof, it is assumed that the portion of the community upon which they are laid is peculiarly benefited, and the property therein enhanced in value — — that those who reap the benefit thereof may bear the burden.

Embree vs. Kansas, 240 U. S. 242-251.
Hagar vs. Reclamation Dist., 111 U. S. 701-715.
Fallbrook Irrigation District vs. Bradley, 164 U. S., 112-179.
Norwood vs. Baker, 172 U. S. 269-303.
K. C. Southern Railroad Co. vs. Improvement District, 256 U. S. 658-661.
Gast vs. Schneider, 240 U. S. 55-60.
Milheim vs. Moffat Tunnel District, 262 U. S. 710-724.
Valley Farms Company vs. Westchester, 261 U. S. 155.
Thomas vs. K. C. S. Railroad Co. 261 U. S. 481-485.
Miller vs. Sacramento, etc. Drainage District, 256 U. S. 129-131.
M. P. Railroad Co. vs. Western Crawford Road Improvement District, 266 U. S. 187.
K. C. S. Railroad Co. vs. Road Improvement District 266 U. S. 379.
Branson vs. Bush, 251 U. S. 182-192.
Dallas County Levee District vs. Looney, supra.

T. & P. Railway vs. Ward Co. etc., District, supra.
Cooley on Taxation (2d Ed.) 606.

The principle applies as well to districts created by the legislature as those created under its authority; it being generally assumed with respect to the former the legislature has considered the question, while in the latter the question becomes judicial in its nature and it is required that a standard of action in the selection of the district to be established be employed.

It is recognized that in the establishment of these districts there may be disappointments in their benefits, and uncontrollable inequalities in the apportionment of the tax; as the direct and proximate benefit cannot be readily seen.

Valley Farms Co. vs. Westchester, supra.
Kansas City So. Ry. Co. vs. Road Dist. 3, supra.

But, it is essential there be a consideration of the question. The difficulty is not solved by an abdication of the duty imposed to consider these things, and, in cases where the legislature instead of determining the questions itself, commits the selection of the district to a local body, a definite standard of determining the benefits and boundaries of the district must be fixed, so that the selection of the district will not be a mere matter of speculation and conjecture.

Kansas ity So. Ry. Co. vs. Imp. Dist. 256 U. S. 658.
Thomas vs. K. C. S., 261 U S 481.
Kansas City So. vs. Road District 3, supra.

It is not so much a matter of which of the methods may

be used, as the manner of their employment when once the nature of the tax is ascertained that is involved. The organic law may invest the power of taxation in the legislature or municipal authorities. These agencies are then free to exercise it as they see proper, limited only by the organic law itself, and the fundamental requirement that their action be according to those inherent usages of our country that may not be characterized as harsh, arbitrary, grossly unequal or fraudulent. While, if the legislature in whom the power of taxation rests, invests the determination of those questions which it properly should decide, in subordinate agencies, due process and that equal protection of law may be afforded to all, and that the use of the power may not amount to confiscation, requires that those affected thereby be afforded an opportunity to be heard after due notice. These are the usual modes and the rules applicable to them. How much more do these guaranties apply when the legislature in which the power of taxation is vested by the highest and most solemn of our institutes, our written Constitution, undertakes to abdicate its power and permit the subjects to be taxed without the slightest consideration being given the questions it alone can determine, or require to be determined according to the sacred usages of our scheme of government?

Under this law there is no legislative determination of any question save the mode of tax, which is at the same rate and on an ad valorem basis throughout the entire area, and, it is prospective and general in its application, as the statutes considered in Martin vs. District of Columbia, 205 U. S. 135-41, 51 L. E. D. 743, L. & N. R. R. vs. Barber etc. Co. 197 U. S. 430, 49 L. E. D. 819.

Not only this, but the district may well be carved so as to throw out opposition—opposition by reason of lack of benefit that is justifiable—and yet include the opposers' lands. There is no limit to the caprice that may actuate the formation of the district, and, yet there is no tribunal for determination of the benefits or where those injured may be heard. It is hard to conceive that when such a district is formed by the interested property owners they will be actuated by motives of unselfishness and fairness, but, rather that they would incline to the lightening of their own tax burden by increasing that of their distant neighbors. Those peculiarly benefited by such an improvement would naturally incline to do this; it is only human that they should. That is why it has so often been said a man should not be judge of his own cause. That is why government itself is essential to the preservation of individual property rights, its highest attribute. In a democracy we should preserve the franchise rather to the administration of public affairs through Constitutional agencies, than the direct administration of them at the public hand.

It is the fatal tendency to execute laws by popular voice that years ago provoked De Tocqueville to observe of our institutions, that in the power of the tyrannous majority in the land, lay the great danger of decay in our institutions; and the great Montesquieu to observe that in a democracy the tendency of the majority to become tyrannous and over-bearing in their attitude toward the minority, breeds discontent and disintegration of its parts.

No more fitting example of the facts upon which these observations are based can be imagined than those revealed in the

procedure prescribed by the law under investigation in this case. The agencies constituted by the people for the protection of their fundamental rights to property would no more be divorced from the exercise of their Constitutional functions of impartial administration of the public business; the sovereign power of the legislature could no more be effectually divested, if the entire affair had been committed to the hands of the petitioners for the road district as representatives of the two-thirds majority. We take it as a cardinal principle of our democracy that not only the majority may be heard, but that every person affected must be given his voice in the matter whether the ultimate decision be for or against him.

It may not be douted that the Legislature has power to tax and to create taxing districts. It may not be doubted that the legislature may delegate to existing municipalities or boards these rights, to create additional boards or agencies for the performance of such functions. But, these powers are inherent in the sovereignty of the legislature, and it may well be doubted if the legislature has the power, consistent with due process as we understand it, to wholly divest itself of this power and invest it in the people. To affirm such a power in the legislature is to say that it may change our mode of government and our constitution. When it undertakes to delegate its power it must keep a hand, as it were, upon the exercise of its delegated authority, by prescribing rules for determining the questions it must otherwise determine itself. In some of the cases, we think the word "delegate" may be rather loosely understood when used in this connection. The more apt expression would be to say that the legislature may not

delegate its power at all, in the sense of surrendering it, but may exercise its power through the instrumentality of the local authorities, by prescribing rules of conduct for them in the exercise thereof. In this sense the power is not delegated, but the proceeding partakes the nature of one in which the legislature has merely provided for the administration of public affairs by the established agencies of the government.

In attempting to permit the formation of a taxing district for local improvements without determining or providing for the determination of the question what property should be taxed therefor, the legislature has in effect delegated to the petitioners for the road district a power it does not itself possess. It is essential, we say, that there be a determination of this question, and the legislature may determine it or prescribe rules for the determination of it by local authorities. The legislature itself would not be authorized to create a taxing district without determining the question. This would be an abuse of power. Certainly, then, it could not authorize the creation of the district without such determination. The fundamental authorities so hold, and are conclusive of the proposition. In Cooley on Taxation (4th Ed. 1924), the subject is treated thus:

> "The power of taxation is an essential and inherent attribute of sovereignty, belonging as a matter of right to every independent government. It is possessed by the government without being expressly conferred by the people. In fact, the power of taxation may be defined as 'the power inherent in the sovereign state to recover a contribution of money or other property, in accordance

with some reasonable rule or apportionment, from the property or occupations within the jurisdiction for the purpose of defraying the public expenses. Constitutional provisions relating to the power of taxation do not operate as grants of the power of taxation to the government but instead merely constitute limitations upon a power which would otherwise be practically without limit (Sec. 57) * * * The power to impose taxes is a legislative power and cannot be exercised by the executive or judicial branch of the government. (Sec. 63) * * * The legislature has unlimited discretion as to the persons, property, or occupations to be taxed, where there are no constitutional restrictions. (Sec. 71) * * * The legislature has the right to finally determine the amount or rate of tax, in the absence of constitutional prohibitions. (Sec. 72) * * * The discretion of the legislature in imposing taxes extends to the mode, method or kind of tax. (Sec. 73) * * *

"It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which pervades our whole political system, and, when properly understood admits of no exception. And it is applicable with peculiar force to the case of taxation. The people have created a legislative department for the exercise of the legislative power; and within that power lies the authority to prescribe the rules of taxation, and to regulate the manner in which those rules shall be given effect. The people have not authorized this department to relieve itself of the responsibility by a substitution of other agencies. * * * Since legislative power ordinarily is not delegable, it follows, a fortiori, that it cannot be dele-

gated to a private person or to private corporations. (Sec. 74). As a preliminary to determining the validity of an alleged delegation of power relating to taxation it is proper to consider whether there has been any delegation of legislative as distinguished from administrative powers. **It is only a delegation of legislative power to a nonlegislative body or person that is objectionable.** If the power delegated is a ministerial one, it matters not that the delegation is to another branch of the government. There is no prohibited delegation where the delegation is of duties merely advisory or ministerial in their nature. In other words, the legislature must make the law, but it may prescribe its own regulations regarding the ministerial agents that are to execute it. As applied to taxation, this rule simply calls for a classification of what part of taxation is legislative and what part is administrative. Every system of taxation consists of two parts * * *(1) the elements that enter into the imposition of the tax and (2) the steps taken for its assessment and collection. The former is a legislative function which cannot be delegated except as hereinafter noticed; the latter is mere machinery and delegable to other than governmental agencies. **The non-delegable powers, i. e., the powers which cannot be delegated to merely ministerial or judicial officers include the selection of the property to be taxed,** the determination of the purposes for which taxes shall be levied, the fixing of the amount of the tax to be imposed, the fixing of the rate of taxation, and the prescribing of the rules for taxation in general. So it has been held that the nondelegable powers to tax, as meaning the inability of the legislature to delegate the power to tax to the executive or judicial department of government, includes the method to be employed in arriving at the fair taxable value of the property. 'It may

be laid down as a general proposition' says the Supreme Court of the United States, 'that where a legislature enacts a specific rule for fixing a rate of taxation, by which rule the rate is mathematically deducted from facts and events occurring within the year and created without reference to the matter of that rate, there is no abdication of the legislative function, but on the contrary, a direct legislative determination of the rate.'

"On the other hand, delegable powers which are not legislative, include the power to value property for taxation in pursuance of fixed rules, the equalization of assessments by a central body, the collection of the taxes, etc. After the tax is once levied or imposed, i. e., ordered to be laid, further proceedings, such as the extending, assessing and collecting the taxes, are administrative. * * * " (Sec. 78).

"Conceding that some power to tax may be delegated to municipal corporations and the like, the next question is as to the extent of the power which may be delegated. When it is said that the power to tax may be delegated to municipalities and the like, it is meant that there may be delegated such measure of power to impose and collect taxes as the legislature may deem expedient. The legislature may delegate power to tax all local property or only certain kinds thereof, or to tax for all purposes or for only certain purposes. It may delegate the power to tax the capital stock and property of, and shares of stock in corporations, and to collect an ad valorem tax on corporate franchises. So power may be delegated to impose a poll tax, or a succession tax, or occupation taxes. So the legislature may delegate its power to impose both a property and a license tax in connection with the same property."

"On the other hand, the power delegated cannot be greater than that possessed by the delegating authority. (Sec. 80).

"Constitutional provisions, or statutes, claimed to delegate the power to tax will be strictly construed in favor of the taxpayer, in determining whether any power to tax has been delegated and also, where it is conceded that some power to tax has been delegated, in determining the scope of the delegated power (Sec. 83)."

Chief Justice Taft in Wichita R. R. & Light Co. vs. Public Utilities Co., 260 U. S. 48-59, 67 L. E. D. 124, pointed out that:

"The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the state. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action."

And, in Embree vs. Kansas, 240 U. S. 242, 251, 60 L. E. D. 624, an action similar to this, where it was held,

"As the district was not established by the legisla-

ture, but by an exercise of delegated authority, there was no legislative determination that its location needs and boundaries were such that the lands therein would be benefitted by its creation and what it was intended to accomplish and, this being so, it was essential to due process of law that the land owners be accorded an opportunity to be heard upon the question whether their lands would be thus benefited."

And, in the case of Fallbrook Irrigation District vs. Bradley, 164 U. S. 112, 179, 41 L. E. D. 369, involving the validity of the creation of an irrigation district by a municipality, under legislative provision,

> "The legislature not having itself described the district, has not decided that any particular land would or, possibly could be benefited as described, and therefore, it would be necessary to give a hearing at some time to those interested upon the question of fact whether or not the land of any owner which was intended to be included would be benefited by the irrigation proposed. If such a hearing were provided for by the act, the decision of the tribunal thereby cerated would be sufficient."

A determination of the question of benefits is essential in any event for as said in Norwood vs. Baker, 172 U. S. 269, 303, 43 L. E. D. 443,

> "The legislature, generally speaking may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement. * * * There is a point beyond which the legislative department, even when

exerting the power of taxation, may not go consistently with the citizen's right of property. * * * The principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore, the owners do not in fact pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received."

How true is this observation in the present case. Here, under the statute there is not only no determination by anyone of the question whether the property taxed will be benefited at all or not, but there is no way the property owner can be heard on the question. The district is formed in blind obedience to

the absolute will of a few people, whether any of the property taxed is benefited by the improvement or not and regardless of its situation with reference thereto. There being no criteria for the determination of these vital issues, surely the law is

> "of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred,"

as in Kansas City S. R. Co. vs. Improvement District, 256 U. S. 658-661, 65 L. E. D. 1151; Gast Realty Co. vs. Schneider Inv. Co., 240 U. S. 55-60, 60 L. E. D. 523 and Martin vs. District of Columbia, 205 U. S. 134, 51 L. E. D. 742.

Finally, on this point, we refer to the quotations from the authorities on pp 56-59 hereof.

It would seem from this examination of the cases in this court since McCullough vs. Maryland, 4 Wheat 316, 4 L. Ed., 479, that the proposition we make is self evident. In each decision the assumption is that before the sovereign power of taxation can be exercised there must be a determination as to what shall be the property subjected to the tax; that this determination involves the selection of such property, and that such determination is an exercise of legislative function. It has never, in any case before this court, been assumed, and nothing has been said that would warrant the inference, that the power of taxatoin may be exercised by the people directly. This does not by any means detract from the settled proposition that the people may limit

by constitutional provision, or the legislature may require as a safeguard against the exercise of local authority, under legislative enactment, the power of the legislature or local authorities by providing for the institution of such proceedings by petition of the persons affected, or the approval of a proposed expenditure by local vote. It rather establishes the point, for in either case there is the necessary assumption above indicated, that the property to be taxed and persons affected have been or are to be legislatively selected.

II

A State Legislature cannot abdicate its power of taxation by delegating to private citizens the authority to select property for taxation and establish taxing districts.

Much that has just been said of the necessity for legislative determination of questions properly said to be legislative in character, as relates to tax matters, is persuasive here; for if it is not lawful for a tax district to be created except it be after legislative deliberation, it would seem to follow, naturally, that the legislature could not by delegating its power, authorize the creation of a tax district otherwise. Yet, the law in question presents just such a case.

Due process requires, at least, that those powers surrendered by the people, be exercised in the usual way by the department of government in whom they are vested, and not by private individuals.

Looking to the substance of the proceedings we find it

was the petitioners who established the district; they defined its boundaries and selected the roads to be built; they fixed the amount of bonds to be issued and the rate of interest and their maturity. (R. 410). The appellees acted merely as ministerial agents in calling the election, issuing the bonds and assessing and collecting the tax for the district. (R. 418-35)

Under the Texas cases quoted from supra pp. 14-22 and the constitution itself (appendix 79) it is incontrovertible that the power of creating these road districts was vested by the constitution in the Legislature. The only right they reserved was to make the issuance of bonds in a district dependent upon a vote of a majority of the people affected thereby. The legislature is authorized to provide for the districts. (Appendix 79) and Moore vs. County Commissioners, 175 S. W. 849, quoted from on page 14 hereof.

In Michigan Central Railroad Company vs. Powers, 201 U. S. 245, at Page 294, this court noted there might be a question whether a delegation of legislative power to other departments of the state government would be void under the Federal Constitution. But the question was not decided, nor, so far as we can find, has it ever been answered by this court. However, there are, in the decisions, so many expressions, indicative of the purpose of this court to preserve the government by discountenancing a denial of the fundamental rights of the citizen, that there can be no doubt an abdication of state legislative power, in favor of private persons, or an attempt on its part to do indirectly what it cannot do directly, where the fundamental rights guaranteed by the Fourteenth Amendment are impinged, is void.

The very statement of the nature of the power to tax subjects refutes the idea of a tax imposed by one man on his neighbor. As said by Chief Justice Marshall,

> "The only security against the abuse of this power of taxation is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation."
>
> McCullough vs. Maryland, 4 Wheat, 316, 428.

The present Chief Justice gave voice to these views in the quotation from Wichita R. R. and L. Co. vs. Utilities Com. Supra p. 40.

In Holden vs. Hardy, 169 U. S. 366-398, it is said that:

> "This court has never attempted to define with precision the words 'due process of law' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which no member of the Union may disregard. * * * The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' but its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the

Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political conditions by having been acted on by them after the settlement of this country * * * The words 'law of the land' as used in Magna Charta, implied a conformity with the 'ancient and customary laws of the English people' and that it was wiser to ascertain their intent and application by the 'gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right of property, shall be taken for the benefit of another, or for the benefit of the state, without compensation; and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense."

In Hagar vs. Reclamation District, 111 U. S. 701-715, it was pointed out that these fundamental guaranties of the right of the citizen to his property apply in matters of taxation, by the government as well as in the other relations of the subject with the government—and in all of the cases in this country since that time, the same principles have been applied.

In commenting upon the fact that the state has no power

to authorize taxation for purely private enterprises unaffected by the public interest, this court, in Citizens Saving and Loan Association vs. Topeka, 20 Wall. 655-670, said:

> "It must be conceded that there are such rights (of property) in every free government beyond the control of the state. A government which recognized no such rights, which held the life, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. * * * It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whehter it is not wiser that this power should be exercised by one man than by many.
>
> "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.
>
> "There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

It was said by the Supreme Court of Kansas in Hutchinson vs. Leimbach, 63 L. R. A. 630, where the legislature attempted to authorize petitioners to arbitrarily determine by

their petition that land should be taken out of a city limit, that

> "Under the provisions of the Act, the will that the corporate boundaries shall be changed proceeds, not from the legislature nor from the council, but from the signers of the petition, who are under no official responsibility, and of whom no other qualification is required than that they desire the change. These provisions are, therefore, void."

That the states have no power to vest in unrestrained individuals, control of the life, liberty or property of another has been decided by this court in cases arising under the police power.

In Yick Wo vs. Hopkins U. S. 356, where the conduct of a laundry business in San Francisco was dependent upon procuring the consent of residents in the vicinity, this court said:

> "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some

person or body, the authority of final decision; and, in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possession, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living or any material rights essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

And again in Eubank vs. Richmond, 226 U. S. 137-145, where the establishment of a property line abutting any street was arbitrarily determined by the owners of two-thirds of the property abutting thereon, Mr. Justice McKenna for the court, said,

"It (the ordinance) leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determines not only the extent of use, but

the kind of use which another set of owners may make of their property. In what way is the public safety, convenience, or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed, in the same locality. There may be one taste or judgment of comfort or convenience on one side of a street and a different one on the other. There may be diversity in other blocks; and, viewing them in succession, their building lines may be continuous or staggering (to adopt a word of the mechanical arts) as the interests of certain of the property owners may prompt against the interests of others. The only discretion, we have seen, which exists in the street committee of public safety, is in the location of the line, between 5 and 30 feet. It is hard to understand how public comfort or convenience, much less public health can be promoted by a line which may be so variously disposed.

"We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property rights of others, and property determined, as the case may be, for business or residence even, it may be, the kind of business or character of residence. One person having a two-thirds ownership of a block may have that power against a number having a less collective ownership. If it be said that in the in-

stant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property, exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power."

In the respects we have pointed out the statute involved in this case is most extraordinary. It is dissimilar to any legislation that has ever been before this court. Even in Texas, the law under which drainage districts are organized, enacted pursuant to the same constitutional authority, provides for notice and hearing to the property owners upon the inclusion of their property within the boundaries of this district. Under that law a petition is presented to the County Commissioners' Court; upon presentation it is set down for hearing at a regular or special session of the Court not less than fifteen nor more than thirty days thereafter. Ten days notice is given by posting or publication; at the time specified any person affected by the district may appear and protest the same, the Court being given jurisdiction to hear and determine all contests and objections to the creation thereof and to define the boundaries of the same. Revised Statutes 1920, Articles 5530-5584.

By an Act passed in 1918, Conservation and Reclamation districts are authorized to be created by the County Commissioners' Court in the same manner as levee districts. Articles 5584½-5584¼tt.

By Article 6990-7012, the County Commissioners' Courts

are vested with jurisdiction to establish drainage systems for public roads, the proceedings to be instituted upon petition of at least one hundred tax payers and voters of the county, which petition is to be heard after ten days written notice to those affected, the Court, being given authority to hear any and all objections to the petition and the proposed assessment therefor and an appeal being allowed from the verdict of a jury of view provided for, to any court of the County having jurisdiction of the amount of the assessment appealed from.

The levee district law because of the fact that the petition is heard by the County Commissioners' Court after notice pursuant to which all property owners affected may be heard and their rights on all questions involved in the proceedings determined has been held constitutional in the cases of Dallas County Levee District vs. Looney, 109 Texas 326, 207 S. W. 310; Holt vs. State, 176 S. W. 743; David vs. Timon, 183 S. W. 88; Ogburn vs. Barstow, 230 S. W. 1036; Wharton County Drainage District No. 1 vs. Higbee, 149 S. W. 381, and T. & P. Ry. vs. Ward Co., 112 Tex. 593; 251 S. W. 212; 257 S. W. 333, while the rule of Norwood vs. Baker has been applied in Hutcheson vs. Storrie, 92 Tex. 685.

The tax, in this case is required to be according to assessed valuation for general purposes so that the rate of tax, once the bonds are voted, is to be determined by a purely mathematical process. In the determination of the amount of the tax directly after the district has been established, the Legislature was within its power. But, by in substance, authorizing the petitioners to irrevocably and conclusively de-

termine the area and boundaries of the district, it permitted them also to determine the amount of tax, because they may, for purely personal reasons in one instance, determine upon a very small area for their district, while in another instance, for no particular reason at all, they may select a large territory. They may likewise, to avoid opposition to their project, include all the property of those favorable to the project or they may exclude from the boundaries of the district the mere residence of a large property owner at the same time including his land. The district may be carved by the petitioners to suit their arbitrary desires. In fact we only state the record when we say that it may be formed to suit the desires of one man because it appears that the County Judge of Archer County and a lawyer down there drew the petition and that it was merely circulated among the people of Archer City who were interested in getting a road to Wichita Falls and were willing to sign anything to get it. (R 42-57).

In permitting this, the law is clearly distinguishable from those cases in which the Legislature itself has selected the property to be taxed, determined the question of benefit and other questions pertaining to the establishment of the district or tax itself.

The usage of the custom of creating special assessment districts for the purpose of compelling contribution only from that property assumed to be specially benefited is of so ancient origin and so firmly rooted in our jurisprudence that it would do violence to reason to now attempt, consistently with our understanding of due process of law and equal protection of

law, to leave to the arbitrary pleasure of a few the imposition of the same special assessment on property only generally benefited as that laid on property justly thought to be specially benefited. Considering public roads as specially benefiting property in their vicinity upon which all or a part of the burden of their construction is placed, there could be nothing more arbitrary and capricious than permitting property not substantially benefited in fact to be taxed on the same basis, at will. This is what is authorized under this law, and as found by the lower court, actually done with appellant's property—for the purpose of raising revenue and to prevent complainants from getting an improved road for at least thirty years. (R 60).

Myles Salt Company vs. Board of Commissioners, 239 U. S., 478, where it was attempted to create a drainage district to drain swamp lands, including therein the property of the Salt Company, which was on an island rising some 175 feet above the level of the surrounding country, and which in no way could be benefited by the drainage system so established. In this case, undoubtedly, the general public good of draining the surrounding country would have justified a general tax upon the salt company.

K. C. S. R. Co. vs. Dist. 256, U. S. 658-661.

III

Notice to and a hearing for the property owners is essential before their property can be included in a special assessment district created under legislative authority.

As remarked by the trial court there was no notice to or hearing afforded the appellants before their lands and property were irrevocably taxed for the Road District and the law provided no machinery therefor.

The cases in this court upon the question may be generally divided into three classes. First, those in which the power of establishing the district is vested in the legislature by the organic law, and in which the legislature has established the district itself; second, those in which the organic law vests the legislative power directly in a subordinate agency; and, third, those in which the districts are established under legislative authority.

In the first and second classes, the law is sustained unless it is of such a character as that there is no reasonable presumption that substantial justice generally will be done, but the probability is the parties will be taxed disproportionately to each other and to the benefit conferred.

Branson vs. Bush, 251 U. S. 182-192.
Brieholz vs. Supervisors, 257 U. S. 118.
Houck vs. Little River, 239 U. S. 254-262.
Kansas City S. R. Co. vs. Road District, 266 U. S. 379-389.
Missouri P. R. Co. vs. Road Dist. 266 U. S. 187-190.

In the third notice and a hearing are essential.
See cases cited under third class, infra.

The following cases fall in the first class:

Kansas City So. Ry. Co. vs. Road Dist. 266 U. S. 379-389,

where an act of the Arkansas legislature confirming the establishment of a road district, not palpably arbitrary or a plain abuse was upheld.

Mo. P. R. Co. vs. Road District, 266 U. S. 187-190 where an assessment, by the legislature, to pay the cost of an investigation incident to the establishment of a road district was sustained.

Thomas vs. Kansas City S. R. Co. 261 U. S. 481-485 where the authority of the legislature to define the boundaries of a road district without notice or hearing was recognized.

Valley Farms Company vs. Westchester, 261 U. S. 155 where the authority of the legislature to establish a sewer district with defined boundaries was recognized and no notice or hearing thereon was necessary.

Miller vs. Sacramento Drainage District, 256 U. S. 129-131, where the legislature created the district and no notice or hearing was necessary.

Milheim vs. Moffat Tunnel District, 262 U. S. 710-724, where an improvement district was created by an Act of the Colorado legislature and it held no notice or hearing was necessary.

Branson vs. Bush, 251 U. S. 182-192, where the legislative act declared the property included in a road district to be benefited, and the court refused to disturb its finding though no notice or hearing was afforded.

Brieholz vs. Supervisors, 257 U. S. 118 where an assessment for the cost of repairs in an established drainage district made by the legislature, was held legal although no notice or hearing was provided for.

Kansas City Southern Ry. Co. vs. Improvement District, 256 U. S. 658-661, in which a road improvement district was established by the Arkansas legislature and it was held no notice or hearing was necessary in the establishment of the district. In this case, however, the tax was levied in a grossly arbitrarily and extremely disproportionate manner and the assessment upon the Railway Company's property was declared void.

Wagner vs. Lesner, 239 U. S. 207-220, an Act of the legislature of Maryland levying a tax to pay for improvements that had already been made was held valid without notice or hearing to the property owners.

Spencer vs. Merchant, 125 U. S. 345-361, which is the leading case in this court establishing the principle.

The following cases fall in the second class:

Withnell vs. Construction Company, 249 U. S. 63-72 in which the charter of the City of St. Louis was held an organic law under which the city officials exercised legislative authority in making assessments for street improvements and no notice or hearing is necessary.

Hancock vs. Muskogee, 250 U. S. 454-459, in which the

establishment of a sewer district by local authorities under power delegated to them by the Constitution of Oklahoma was sustained, notwithstanding there was no notice or hearing upon the establishment thereof.

Goldsmith vs. Construction Company, 252 U. S. 12-18 where the charter of St. Louis was again before this court and in which the decision was the same as in the Withnell-Construction case.

Wight vs. Police Jury, 264 Fed. 705, where the establishment of a road district by the police jury of a Louisiana parish, under authority invested in it by the Louisiana Constitution, was sustained, although there was no notice or hearing afforded upon the establishment thereof.

THE FOLLOWING CASES FALL IN THE THIRD CLASS AND ARE APPLICABLE TO THIS CASE:

Embree vs' Kansas, 240 U. S. 242-251, in which a road district was established pursuant to legislative direction and in which this court said:

> "As the district was not established by the legislature, but by an exercise of delegated authority, there was no legislative determination that its location needs and boundaries were such that the lands therein would be benefited by its creation and what it was intended to accomplish and, this being so, it was essential to due process of law that the land owners be accorded an opportunity to be heard upon the question whether their lands would be thus benefited."

Fallbrook Irrigation District vs. Bradley, 164 U. S. 112, 179, 41 L. E. D. 369, involving the validity of the creation of an irrigation district by a municipality, under legislative provision.

> "The legislature not having itself described the district, has not decided that any particular land would, or, possibly could be benefited as described, and therefore, it would be necessary to give a hearing at some time to those interested upon the question of fact whether or not the land of any owner which was intended to be included would be benefited by the irrigation proposed. If such a hearing were provided for by the act, the decision of the tribunal thereby created would be sufficient."

Norwood vs. Baker, 172 U. S. 269, 303, 43 L. E. D. 443.

> "The legislature, generally speaking may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement. * * * There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. * * * The principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore, the owners do not in fact pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits

accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received."

Turner vs. Wade, 254 U. S. 64-70, wherein it was held that

"due process of law requires that after such notice as may be appropriate, the tax payers have opportunity to be heard as to the validity of the tax and the amount thereof by giving him the right to appear for that purpose at some stage of the proceeding * * * If the legislature of the state instead of fixing the tax itself, commits to the subordinate body the duty of determining whether, and in what amount, and upon whom the tax shall be levied, due process of law requires that at some stage of the proceedings, before the tax becomes irrevocably fixed, the tax payer must have the opportunity to be heard, of which he must have notice, whether personal or by publication, or by some statute fixing the time and place of the hearing."

Londoner vs. Denver, 210 U. S. 373, in which under the

Denver City charter and Colorado Statutes the Board of Public works was authorized, upon petition of the property owners, and after notice and hearing to propose to the City council an ordinance creating a special assessment district for street improvements. The Council had discretion to pass or reject the ordinance but could not amend it. If passed the mayor contracts for the work. The property is assessed by the council when the work is completed or the cost is ascertained, notice of the assessment being published and the property owners being given opportunity to file complaints. On the complaints no hearing is mandatory, but it is merely discretionary to permit argument thereon. Under this law is was held there was no denial of due process in failing to give notice or have a petition before the board of public works, as the assessment might not be made at all and the legislature was vested with a discretion as to these preliminary matters that was unimpeachable. However, although complaints were filed no hearing was afforded on the assessment ordinance itself or at any other stage of the matter, and the court said:

> "In the assessment, apportionment and collection of taxes upon property within their jurisdiction, the constitution of the United States imposes very few restrictions upon the state. In the enforcement of such restrictions as the Constitution does impose, this court has regarded substance, and not form. But, where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, be-

fore the tax becomes irrevocably fixed, the tax-payer shall have an opportunity to be heard, of which he must have notice, either personal or by publication, or by a law fixing the time and place of the hearing. It must be remembered that the law of Colorado denies the land owner the right to object in the courts to the assessment upon the ground that the objections are cognizable only by the board of equalization."

"If it is enough that, under such circumstances an opportunity is given to submit in writing all objections to and complaints of the tax to the board then there was a hearing afforded in the case at bar. But we think that something more than that even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here, a hearing in its every essence, demands that he who is entitled to it shall have the right to support his allegation by argument, however brief; and, if need be, by proof however informal. It is apparent that such a hearing was denied to the plaintiffs in error. The denial was by the city council, which, while acting as a board of equalization, represents the state. The assessment was void."

The following taken from cases cited in the second group, supra, further sustain our classification:

The Withnell Construction Co. case:

"Whether a property owner is entitled to be heard in advance upon the question of benefit and apportionment depends upon the authority under which the assessment

is made. When the assessment is made in accordance with a fixed rule adopted by a legislative act, a property owner is not entitled to be heard in advance on the question of the amount and extent of the assessment and the benefits conferred. * * * We are of opinion that the assessment made in accordance with the rule of the St. Louis charter was legislative in character and required no previous notice or preliminary hearing as to the nature and extent of benefits in order to maintain its constitutional validity. The charter of the city of St. Louis was adopted by a vote of the people under State Constitutional authority." The position of the city was explained further by a quotation from St. Louis vs. Western Union Telegraph Company, 149 U. S. 465, 37 L. E. D. 810: "'After the Legislative power of a State is vested in the legislature, generally that body has the Supreme control and it delegates to municipal corporations such measure thereof as it deems best. The city of St. Louis occupies a unique position. It does not, like most cities, derive its power by grant from the legislature, but it framed its own charter under express authority from the people of the State,, given in the constitution. Section 20 and 21, of Article 9, of the Constitution of 1875 of the State of Missouri, authorized the election of 13 freeholders to prepare a charter to be submitted to the qualified voters of the city, which, when ratified by them, was to become 'the organic law of the City.' In pursuance of these provisions of the constitution, a charter was prepared and adopted and is, therefore, the organic law of the city of St. Louis, and the powers granted by it so far as they are in harmony with the constitution and laws of the State, and have not been set aside by any act of the general assembly, are the powers vested in the city. This charter is an organic act so defined by the constitution, and is

to be construed as organic acts are construed. The city is in a very just sense an imperium in imperio. Its powers are self appointed.' * * * We reach the conclusion that the attack upon the validity of the assessment for want of advance notice or hearing as to benefits must fail."

In Hancock vs. Muskogee, the court says:

"The chief reliance of plaintiff in error is upon those decisions which have held that where the legislature instead of determining for itself what lands shall be included in a district or what lands will be benefited by the construction of a sewer, submits the question to some board or other inferior tribunal with administrative or quasi judicial authority, the inquiry becomes in its nature judicial in such sense that property owners are entitled to a hearing or an opportunity to be heard before their lands are included, * * * but they have no application to the case here, as in the case before us, full Legislative power over the subject matter has been conferred by the State upon a municipal corporation. Where that has been done, a legislative determination by the local legislative body is of the same effect as though made by the general legislature."

The District Court held the legislature itself fixed the district. The cases of the third class, supra, refute this idea conclusively.

To say that in 1909 the legislature by this general prospective law defined Road District No. 2, Archer County, Texas, which was first defined in 1924 is an absurdity. Again the District Judge says the district includes two precincts or "political subdivisions." **The record does not show this to be true;**

on the contrary the record is that the district was a "defined district," as, that considered in Moore vs. County Commissioners' Court, supra, Huggins vs. Vaden, supra, and the case of Meurer vs. Hooper, supra, involved this same district. Even had the "defined district" included **two** "political subdivisions," it would leave it a "defined district" for the statute only authorizes the establishment of a "political subdivision" as a road district. By mentioning that cities, towns and villagse may be included in a defined district, and then mentioning a political subdivision specifically, the idea that "two political subdivisions" mean the same thing as **"a political subdivision"** is excluded. See Articles 627, 628 Appendix 69 and the constitutional provision. Appendix 79.

The wisdom of denying the trial court's interpretion of the statute that a district composed of two political subdivisions is yet **"a political subdivision"** rather than a "defined district" under the law, is not tenable for the further reason that these single political subdivisions are presumed to be laid out so as to distribute the votes of the county and the court's interpretation would permit the residents of one political subdivision by petitioning the commissioners' court, to annex another like subdivision into its boundaries, for road purposes, by sheer voting strength, if it so happened that one had more votes than the other—contrary to the evident legislative purpose.

In Meurer vs. Hooper, 271 S. W. 172, the district is considered as a "defined district" under the statute rather than "a political subdivision."

The Statute, Article 637 (Appendix) provides that upon accepting the provisions of this law "any political subdivision of a county or defined district is hereby created a body corporate," which necessarily excludes the idea of its being an established district prior to that time. The statute article 628 is unambiguous—it authorizes any political subdivision of the county, or any defined district of the county to become a road district by accepting the provisions of the law. The arbitrary feature of the situation is, however, that petitioners for a district, instead of including two political subdivisions therein, could as well include half of both or any other arbitrary amounts of land and property they chose.

In the case of Bell County vs. Hines, 219 S. W. 556, a navigation district was established with boundaries coinciding with the boundaries of the county in which it was situated, but the court held that, notwithstanding this fact, the navigation district was not the county but was a separate entity capable of suing and being sued. The court also held in the same opinion that political subdivisions and defined districts as contemplated in the constitution and law in question here were unknown as taxing units **until created by the Statute involved in this suit.** Precincts were simply subdivisions for the election of Justices of the Peace (Rev. Statute of Tex. 1914, Art. 2241) and for electoral purposes.

Coffield vs. Britton, 109 S. W. 493.

Finally, we desire to direct the court's particular attention to the case of Fallbrook Irrigation District vs. Bradley, supra,

and Embree vs. Kansas, supra. These cases sustain the validity of the laws in question there, because in each instance a petition was filed before a board of supervisors, but these boards were given authority and were required to give notice and afford the property owners affected an opportunity to be heard and were authorized to hear their complaints and determine the question whether or not the land included in the district would be benefited or not. This court indicated in both of these casse that if it were not for the provisions requiring notice and a hearing and determination on the question of benefits, the laws would be violative of the Fourteenth Amendment.

CONCLUSION

Because the appellants' property has been taxed and encumbered with a lien for the construction of roads in the manner and under the circumstances hereinbefore set forth in violation of the guaranties of due process and equal protection of the laws contained in the Fourteenth Amendment to the Federal Constitution, we respectfully submit that the decree of the District court should be reversed and judgment here rendered as it should have been rendered in the District Court.

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APPENDIX

The statutes and constitutional provisions involved. From Vernons Compiled Statutes of Texas, 1920.

Art. 627. **Power to Issue Road, etc., Bonds and Levy Tax for Interest and Sinking Fund.** Any county in this state, or any political subdivision or defined district, now or hereafter to be described and defined, of a county, is hereby authorized and empowered to issue bonds, or otherwise lend its credit, in any amount not to exceed one-fourth of the assessed valuation of the real property of such county, or political subdivision, or defined district thereof, and to levy and collect such taxes to pay the interest upon such bonds and provide a sinking fund for the redemption thereof, for the purpose of constructing and maintaining and operating macadamized, graveled or paved roads and turn-pikes, or in aid thereof. (Acts. 1909, p. 86; Acts 1907, p. 251; Acts 1909, S. S. p. 271).

Art. 628. **Election for; Propositions, Restrictions and Requirements; Provision as to Interest.**—Upon the petition of fifty, or a majority of resident property tax paying voters of any county, or political subdivision or defined district of any county in this state, to the county commissioners' court of such county, such court shall have the power, and it is hereby made its duty, at any regular or special session thereof, to order an election to be held in such county, political subdivision or defined district thereof to determine whether or not the bonds of such county, or political subdivision or defined district thereof, shall be issued in any amount not to exceed one-

fourth of the assessed valuation of the real property of such county, or political subdivision, or defined district, for the purpose of constructing, maintaining or operating macadamized, graveled or paved roads and turnpikes, or in aid thereof; and, at such election, there shall also be submitted to such resident property taxpaying voters the question as to whether or not a tax shall be levied upon property of said county, or political subdivision or defined district thereof, subject to taxation, for the purpose of paying the interest on said bonds and to provide a sinking fund for the redemption thereof. The amount of bonds proposed to be issued, with rate of interest thereon and date of maturity, shall be stated in the order ordering said election, and in the notice therefor; or such order and notice may provide that the bonds may bear interest at the rate to be fixed by the commissioners' court, not to exceed five and one-half per cent, and that the bonds may mature at such time as may be fixed by the commissioners' court, serially or otherwise, provided in Articles 637a and 637b hereof; provided that where such election is ordered for a political subdivision or defined district of a county, other than the whole county, such order and notice of election shall describe the boundaries thereof as described and defined in the order of the county establishing such political subdivisions or defined district of the county. (Acts 1907, p. 250; Acts 1909, S. S. p. 271, sec. 2; Acts 1917, ch. 203, sec. 1.)

Art. 629. **Notice of Election.**—Notice of said election shall be given by publication, in a newspaper published in the county for four successive weeks, and in addition thereto by

posting notices at three public places in the county, one of which shall be at the courthouse door, for three weeks prior to said election, if said proposed issue of bonds and levy of taxes is for the entire county. If said proposed issue of bonds and levy of taxes is for any political subdivision or defined district of the county, notice of such election shall be given by publishing, in a newspaper published in the political subdivision or defined district in which such bond is proposed, and, if no newspaper is published in such political subdivision or defined district, then in some newspaper published in the county, for four successive weeks, and by posting in at least three public places in such political subdivision or defined district of the county, for three successive weeks prior to said election. (Id. Sec. 3).

Art. 630. **Time, Place and Manner of Holding Election**—The commissioners' court of the county shall determine the time and place or places of holding such election; provided, no such election shall be held at any time less than thirty days from the time of making of the order ordering the election. The manner of holding said election shall be governed by the general laws of the state when not in conflict with the provisions of this subdivision of this chapter, and the returns of said election shall be made as now provided by law for making returns of elections held for the purpose of determining whether or not county bonds shall be issued. (Id. sec. 4).

Art. 631. **If Election Carried by Two-Thirds Vote, Bonds to be Issued.**—If, after the result of said election is known, it shall appear to the commissioners' court of the county in

which said election was held, that a two-thirds majority of the vote cast at such election were in favor of the issuance of bonds, **it shall be the duty of said commissioners' court, as soon thereafter as practicable, to issue said bonds on the faith and credit of said county, or of said political subdivision or defined district now or hereafter to be described and defined,** within the state of Texas, and which may or may not include towns, villages, or municipal corporations of the county, as the case may be. (Id. Sec. 5.)

Art. 632. **Bonds, Term, Interest, Examination, Registry, Custody, Sale, Disposition of Proceeds; Disbursement, Regulation of.**—Such bonds shall run not less than twenty nor more than forty years, with such option of redemption as may be fixed by the commissioners' court; and such bonds shall bear not more than five and one-half per cent interest per annum, and which bonds shall be examined by the attorney general of Texas, and registered by the comptroller of public accounts of Texas. Such bonds, when so issued, shall continue in the custody of, and under the control of the commissioners' court of the county in which they were issued, and shall be by said court sold to the highest and best bidder, for cash, either in whole or in parcels, at not less than their par value, and the purchase money thereof shall be placed in the country treasury of such county to the credit of the available road fund of such county, or of such political subdivision or defined district of such county, as the case may be. Such funds shall be paid out by the county treasurer upon warrants drawn on such funds issued by the county clerk of the county, countersigned by the county judge, upon certified accounts approved by the

commissioners' court, of the county, when such funds belong to the entire county; and, when such funds belong to a political subdivision or defined district of a county, such funds shall be paid out by the county treasurer upon warrants issued by the county clerk, upon certified accounts of the road superintnedent of such road district, and approved by the commissoiners' court of the county. (Id. Sec. 5).

Art. 633. **General Laws Applicable.**—The general laws of Texas relative to county bonds, not in conflict with the provisions of this subdivision of this chapter shall apply to the issuance, approval, registration, sale and payment of the bonds provided for in said provisions. (Id. Sec. 5.)

Art. 634. **Tax for Interest and Sinking Fund; Levy, Assessment and Collection; Treasurer to be Custodian, and to Deposit with Depository.**—Before said road bonds shall be put on the market, the county commissioners' court of the county in which such election was held shall levy a tax sufficient to pay the bonds at maturity; provided, that said tax herein authorized shall be assessed and collected in the same manner as now provided by law for the assessment and collection of other road taxes, if for a whole county, and, if for a political subdivision or other defined district of a county, then it shall be assessed and collected as is now provided by law for the assessment and collection of common school district special local taxes. And it is hereby made the duty of such commissioners' court to levy such tax, and it is hereby made the duty of the tax collector and assessor of each county wherein such taxes have been levied to assess and collect the same in the same

manner and at the same time as other taxes. And said taxes when so collected by such collector, shall be by him paid over to the county treasurer of such county, as and when other taxes are paid to the county treasurer. And the county treasurer of said county shall be custodian of all funds collected by virtue of this law, and shall deposit the same with the county depository as county funds. (Id. Sec. 6).

Art. 635. **Treasurer to Pay Interest and Sinking Fund.**— The treasurer shall pay the interest and principal as it becomes due on such bonds out of the funds so collected, in the same manner as the law directs in case of county courthouse bond funds. (Id. Sec. 6).

Art. 636. **Numbering of Districts and Bonds to Correspond, etc., Designation of Bonds. Provision Not Applicable to Bonds of Whole County, Designation of Latter.**—For the purpose of operating and being known under the provisions of this subdivision of this chapter, each political subdivision or defined district now or hereafter to be described and defined for the employment of said subdivision, in any county in this state shall be known as "Road District No.—— of ————County, Texas," and the bonds herein provided for in such political subdivision or defined district in any county, shall be known as "Road Bonds of Road District No. —— of ————County, Texas," being definitely numbered and bearing the name of the county in which it is located. This article shall apply only to districts composing less than a county, and shall not apply to bonds issued hereunder by a whole county, which county bonds shall be known as "——— County Special Road Bands,"

taking the name of the county issuing the same. (Id. Sec. 7).

Art. 637. **District Accepting Provisions to be Body Corporate; Powers.—For the purpose of this subdivision of this chapter, any political subdivision of a county or defined district, now or hereafter to be described and defined, accepting the provisions of said subdivision, by voting such tax, is hereby made and created a body corporate, which may sue and be sued in like manner as counties.** (Id. Sec. 7).

Article 2827 of the Revised Laws provides for common school district special local taxes, as follows:

"The commissioners' court of any county in this state shall have power to levy a special tax for the further maintenance of public free schools, and the erection within each school district of a school house or schoolhouses; provided, a majority of the qualified property tax paying voters of the district, voting at an election to be held for the purpose, shall vote such tax, not to exceed in any year fifty cents on the one hundred dollars valuation of the property subject to taxation in such district; provided, that all property assessed for school purposes shall be assessed at the rate of value of property as said property is assessed for state and county purposes."

Articles 2828 to 2835 provide for an election in the common school district for determining the tax authorized in the foregoing section.

Article 2836 is as follows: **Levy of Tax.—The county commissioners' court shall at the time of levying the taxes for county purposes, also levy upon such school district the rate**

of tax said district has voted upon itself, or if the proposition shall have been, "for a school tax not exceeding fifty cents on the one hundred dollars valuation of taxable property in the district,' the commissioners' court shall levy such a rate with that limit as shall have been determined by the board of trustees of said district and the county superintendent, and certified to said court by the county superintendent. It shall be the duty of the tax assessor to assess said taxes as other taxes are assessed, and to make an abstract showing the amount of special taxes assessed against each school district in his county, and to furnish the same to the county superintendent, on or before the first day of September of the year for which such taxes are assessed; **and the taxes levied upon the real property in said districts shall be lien thereon, and the same shall be sold for unpaid taxes in the manner and at the time of sales for state and county taxes.** A special tax voted in any district after the levy of county taxes shall be levied at any meeting of the commissioners' court prior to the delivery of the assessment rolls by the assessor. The tax assessor shall assess, and the tax collector shall collect said district taxes as other taxes are assessed and collected. The tax assessor shall receive a commission on one-half of one per cent for assessing such tax, and the tax collector a commission of one-half of one per cent for collecting the same. The tax collector shall pay all such taxes to the county traesurer; and said treasurer shall credit each school district with the amount belonging to it, and pay out the same in accordance with the law."

Art. 7564. **Boards of Equalization.**—The commissioners' courts of the several counties of this state shall convene and

sit as boards of equalization on the second Monday in May of each year, or as soon thereafter as practicable before the first day of June, to receive all the assessment lists or books of the assessors of their counties for inspection, correction or equalization and approval.

1. They shall cause the assessor to bring before them at such meeting all said assessment lists, books, etc., for inspection, and see that every person has rendered his property at a fair market value, and shall have power to send for persons, books and papers, swear and qualify persons to ascertain the value of such property, and to lower or raise the value of the same.

2. The shall have power to correct errors in assessments.

3. They shall equalize improved lands in three classes, first class to embrace the better quality of land and improvements, the second class to embrace the second quality of lands and improvements, and the third class to embrace lands of but small or inferior improvements. The unimproved lands shall embrace first, second and third class, and all other property as nearly uniform as possible.

4. After they have inspected and equalized as nearly as possible, they shall approve said lists or books and return same to the assessor for making up the general rolls, when said board shall meet again and approve the same, if same be found correct.

5. **Whenever said board shall find it their duty TO RAISE the assessment of any person's property, it shall be their duty to order the county clerk to give the person written notice who rendered the same that they desire to raise the value of the same.** It shall be their duty to cause the county clerk to give ten days written notice before their meeting by publication in some newspaper, but, if none is published in the county, then by posting a written or printed notice in each justice's precinct, one of whcih must be at the court house door.

6. The assessors of taxes shall furnish to the board of equalization, on the first Monday in May of each year, or as soon thereafter as practicable, a certified list of names of all persons who either refuse to swear or to qualify or to have signed the oath or affirmation as required by law, together with the assessment of said person's property made by him through other information; and the board of equalization shall examine, equalize and correct assessments so made by the assessor and when so revised, equalized and corrected, the same shall be approved.

Art. 7614. **Collector for All Taxes.**—The collector of taxes shall be the receiver and collector of all taxes assessed upon the tax list in his county, whether assessed for the state or county, school, poorhouse or other purpose; and he shall proceed to collect the same according to law, and place the same when collected to the proper fund and pay the same over to the proper authorities as hereinafter provided.

Art. 7615. **Collection, When to Begin.**—The collector of

taxes of each county shall begin the collection of taxes annually on the first day of October, or so soon thereafter as he may be able to obtain the proper assessment rolls, books or data upon which to proceed with the business * * * .

Articles 627-637, of the Statute were enacted pursuant to an amendment to the Texas Constitution, adopted in 1904, known as Article 3, Section 52, as follows:

> "The legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the state, to lend its credit or to grant public money or thing of value in aid of, or to, any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company; provided, however, that under **legislative provision** any county, any political subdivision of a county, any number of adjoining counties, or any political subdivision of the state, **or any defined district now or hereafter to be described and defined within the state of Texas,** and which may or may not include towns, villages or municipal corporations, upon a vote of two-thirds majority of the resident property taxpayers voting thereon who are qualified electors of such district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of this constitution,, and levy and collect such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, **as the legislature may authorize, and in such manner as**

it may authorize the same, for the following purposes, to-wit:

(a) The improvement of rivers, creeks, and streams to prevent overflows, and to permit of navigation thereof, or irrigation thereof, or in aid of such purposes.

(b) The construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purposes of irrigation, drainage or navigation or in aid thereof.

(c) The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof."

Supreme Court, U. S.
FILED
FEB 20 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1925

No. 256.

PERRY BROWNING, WM. COLEMAN, JAMES E. DALE, *et al.*,
Appellants,

v.

E. M. HOOPER, E. A. McDONALD, A. L. BISHOP, *et al.*,
Appellees.

REPLY TO PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1925.

PERRY BROWNING, WM. COLEMAN, JAMES E. DALE, *et al.*, Appellants, v. E. M. HOOPER, E. A. MCDONALD, A. L. BISHOP, *et al.*, Appellees.	No. 256.

REPLY TO PETITION FOR REHEARING.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

In reply to the petitions for rehearing herein, the appellants respectfully represent:

Two petitions for rehearing have been filed. That of the appellees, is an epitome of the one of the Attorney General of Texas. We direct our remarks to the latter. Every point raised in our original brief and argument and decided by the Court is attacked in these two petitions, although the petitions merely amplify the defense argued in appellees' brief.

I.

We call attention to the more pronounced errors in the petition:

Reference is made to *Black* v. *Strength*, 112 Texas 188, 246 S. W. 79; *Grayson County* v. *Harrell*, 202 S. W. 160; *Wright* v. *Allen*, 257 S. W. 980; *Cannon* v. *McComb*, 268 S. W. 999, and *Adams* v. *Mullen*, 244 S. W. 1083 (Petition 15-19) as holding a designation of highways was not required. This is immaterial (*Embree* v. *Kansas*, 240 U. S. 242), but the principle of the decisions is that where the contemplated improvement has been designated in the petition for the election and order or notice thereof (perhaps in either) the Court is bound to substantially comply with the designation so made; although in the event there is no designation the Court may use its discretion. To this line of authorities we add, *Stuckey* v. *Jones*, 240 S. W. 565; *Huggins* v. *Vaden*, 253 S. W. 877, 259 S. W. 204.

Moore v. *Commissioners' Court*, 175 S. W. 849, is said (Petition 22) to involve a county bond issue. This is not true. The case involved the legality of Road District No. 10, Bell County, and the language quoted in our brief, pages 14-15, is used in deciding a point raised in the case.

It is said (Petition 29) there is no statute terminating the existence of the district. This is not true. It is evident from Article 637-d, quoted in *Huggins* v. *Vaden*, supra, that where the special purpose for which the district is formed has been accomplished by the retirement of its debts, it loses its corporate existence so that other districts may be created from the same territory.

The mere fact that there may be successive elections (Petition 28), if such be conceded, only accentuates the injury. It would be a Utopian dream to presume that appellants could get a bond

issue voted by the remainder of the district to improve their roads.

Attention is called (Petition 65) to some decisions as holding a highway cannot be considered a local improvement for the purpose of a special assessment. Judge Cooley did not write the sentence at the end of the first paragraph on page 1160 (3d Ed.) where the cases mentioned are referred to. It was added by Mr. Jacobs, compiler of the 3rd Edition. (See *Cooley on Taxation*, 2nd Edition, page 610.) The *Conger-Graham cases* (4 S. W. 327, 11 S. W. 84, 467), mentioned in the note, do not support the text. A highway tax, according to the front foot, resulted in an assessment of $50.00 per acre on abutting property while other specially benefited property was excluded. The method of *apportionment* was held grossly unreasonable and arbitrary and, therefore, void. The Court said, however:

> "We do not mean to adjudge that turnpike districts may not be created in a county, and those within the district taxed to construct them; but, in imposing the burden, the district should include, and the burden be imposed, on those who are particularly benefited by it, or, who by reason of their proximity to the road, would particularly derive the benefits."

Sperry v. *Flygare*, 80 Minn. 325, 83 N. W. 177, 49 L. R. A. 757, 81 A. S. R. 261, was clearly overruled in *Murray* v. *Smith*, 117 Minn. 490, 136 N. W. 5, 40 L. R. A. (N. S.) 173, 29 A. & E. Ann. Cs. (1913-D) 548, where it was held a suburban highway was a local improvement subject to special assessments.

See also *Bauman* v. *Ross*, 167 U. S. 548, 589-590 (quoted infra).

Where has this "discretion" now urged come from? This discretion that was so vigorously denied in the pleadings (R. 36) and evidence of appellees (R. 43, 44, 46, 47). How could it be exercised without a hearing?

The statute of Texas authorized and permitted what was done in this case, and this is sufficient to condemn it.

Montana Co. v. *Mining Co.*, 152 U. S. 160; *Eubank* v. *Richmond*, 226 U. S. 137.

II.

The petitions for rehearing proceed mainly upon the theory that the burden complained of is a general tax imposed by a quasi municipal corporation in the exercise of a general taxing power. This is the original contention of appellees.

They do not recognize that the power of taxation, either general, special or local, is *delegated* to *existing* municipal corporations or quasi municipal corporations *as an incident of their power of governing and regulating local affairs. United States* v. *New Orleans*, 98 U. S. 381; *Citizens Loan Association* v. *Topeka*, 20 Wall. 655; *Ralls County* v. *United States*, 105 U. S. 733.

On the other hand, appellees do not recognize that in the case of specially selected territory which acquires certain limited corporate or public functions upon the voting of an assessment or tax, the district becomes invested with the limited power of carrying out the purpose for which the funds,

ultimately to be derived from the assessment, are raised, *only as an incident of the tax or assessment imposed.* Such an impost is a special assessment. The distinction is clear and was recognized by the Court in its opinion. See cases cited in our original brief, pp. 23-28, 55-67, *Bauman* v. *Ross*, supra; *Harmon v. Bolley*, 120 N. E. (Ind.) 33, 2 A. L. R. 609; *In Re Bonds of Orosi Public Utility District*, 235 Pac. 1004; *Shoshone Highway Dist.* v. *Anderson*, 125 Pac. 219; *Maltby* v. *Tautges*, 50 Minn. 248, 52 N. W. 858.

Under the Texas law (Art. 637) the district has very limited powers. It acquires corporate authority only after it has voted the tax and its only function is to administer the funds derived, ultimately from the special assessments imposed, for the specified purposes. It is clear that its corporate existence and power *are incidents of the assessment.*

Much stress is made in the petitions of the fact that the burden is imposed upon an *ad valorem* basis. There is nothing in the contention, and it is fully answered by this Court in *Bauman* v. *Ross*, supra, on pages 589-590, in the following language:

> "It was contended by some of the owners of lands that the public improvement proposed (a highway) was not of a local character, but was for the advantage of the whole country, and should be paid for by the United States, and not by the District of Columbia, or by the owners of the lands affected by the improvement. But it is for the legislature, and not for the judiciary, to determine whether the expense of a public improvement should be borne by the whole state, or by the district or neighborhood immediately benefited. The case in this respect comes within the

principle upon which this Court held that the legislature of Alabama might charge the county of Mobile with the whole cost of an extensive improvement of Mobile harbor, and, speaking by Mr. Justice Field, said: 'The objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole state. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the state, or lay the greater share or the whole upon that county or portion of the state specially and immediately benefited by the expenditure.' Mobile Co. vs. Kimball, 102 U. S. 691, 703, 704.

"The legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of lands benefited thereby. Davidson vs. New Orleans, 96 U. S. 97; Hagar vs. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663; Spencer vs. Merchant, 125 U. S. 345, 355, 356; Walston vs. Nevin, 128 U. S. 578; Lent vs. Tillson, 140 U. S. 316, 328; Illinois Cent. R. Co. vs. Decatur, 147 U. S. 190, 198, 199; Paulsen vs. Portland, 149 U. S. 30. This authority has been repeatedly exercised in the District of Columbia by Congress with the sanction of this Court. Willard vs. Presbury, 14 Wall. 676; Mattingly vs. District of Columbia, 97 U. S. 687; Shoemaker vs. U. S., 147 U. S. 282, 286.

"The class of lands to be assessed for the purposes may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and may be made to consist

of such lands, and such only, as the commissioners shall decide to be benefited. Spencer vs. Merchant and Shoemaker vs. U. S., above cited; Irrigation Dist. vs. Bradley, 164 U. S. 112, 167, 168, 175, 176; Ulman vs. Mayor, 165 U. S. 719. See, also, the very able opinion of the Court of Appeals of New York, delivered by Judge Ruggles, in People vs. Brooklyn, 4 N. Y. 419, 430.

"The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, *or the market value of the lands*, or in proportion to the benefits as estimated by commissioners. Mattingly vs. District of Columbia, Spencer vs. Merchant, Walston vs. Nevin, Shoemaker vs. U. S., Paulsen vs. Portland, and Irrigation Dist. vs. Bradley, above cited.

"If the legislature, in taxing lands benefited by a *highway*, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some state of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law."

CONCLUSION.

It is respectfully submitted that the petitions for rehearing should be denied.

WM. R. WATKINS,
Attorney for Appellants.

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No. 256.

In the Supreme Court of the United States

OCTOBER TERM, 1925

PERRY BROWNING ET AL., APPELLANTS,

vs.

E. M. HOOPER ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF TEXAS.

(Case reported in Volume 3, Federal Reporter, Second Series, 160-163.)

BRIEF FOR APPELLEES.

Statement of the Case.

The statement made by appellants of this case is substantially correct and is adopted by appellees with the following addition:

The roads to be improved in Road District No. 2, Archer County, Texas, out of the proceeds of the bond issue and from the taxes complained of by appellants are known as the "Southwest Trail" and as the "Ozark Trail," both of which are highways which have been designated by the Highway Commission of Texas as State highways and are a part of the system of highways established by the State of Texas under the direction and supervision of the State Highway Commission of the State of Texas. The Ozark Trail has also been designated by the Federal Engineer as a project upon which Federal aid would be expended in its construction.

The creation of Road District No. 2 and all proceedings in connection therewith were had under authority of Article 3, Section 52, of the Constitution of the State of Texas, and under the

provisions of Articles 627 to 641, inclusive, Vernon's Texas Statutes, 1920.

Appellants attack the creation of the district and the proceedings thereafter down to and including the levying of the tax on the ground that the statutes and proceedings and the tax levy in pursuance thereof are violative of the Fourteenth Amendment of the Constitution of the United States and of Article 3, Section 52, of the Constitution of Texas, in that the plaintiffs' property was arbitrarily and capriciously included in said district, in that no notice was given to the appellants or an opportunity to be heard upon the question of benefits to their property, and in that the tax levied upon the plaintiffs was entirely disproportioned to the benefit, and that the proceedings whereby a tax was levied upon the property of appellants deprived them of their property without due process of law.

Appellants submit three assignments of error, the first two of which complain that the judgment of the court below was in error in decreeing that the statute of Texas and the proceedings had thereunder, whereby a tax was levied upon the property of appellants, violated the due process clause of the Fourteenth Amendment to the Constitution of the United States. The third assignment is that the court below erred in refusing to perpetually enjoin the taxation of their property for Road District No. 2 of Archer County, Texas.

Appellees' Counter Specifications.

1.

The tax sought to be enjoined by appellants is a general tax levied as for ordinary governmental purposes and does not violate the due process clause of the Constitution and does not deny the equal protection of the laws guaranteed under the Fourteenth Amendment of the Constitution of the United States.

2.

The taxes authorized by the Constitution and statutes of the State of Texas to be collected in Road District No. 2, Archer

County, Texas, are general and for the general benefit of the public, regardless of benefits which may immediately accrue to appellants' property.

3.

Appellants were not entitled to any special notice or to any special hearing before the imposition of taxes upon their property as provided in the proceedings had in the levying of taxes in Road District No. 2, Archer County, Texas.

Argument.

I.

Section 52, Article 3, of the Constitution of Texas is as follows:

> "The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of or to any individual, association or corporation, whatsoever, or to become a stockholder in such corporaton, association or company; provided, however, that under legislative provision any county or political subdivision of a county, any number of adjacent counties or any political subdivision of the State or any defined district, now or hereafter to be described and defined within the State of Texas, and which may or may not include towns, villages or municipal corporations, upon a vote of a two-thirds majority of the resident property taxpayers voting thereon, who are qualified electors of such district or territory, to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of this Constitution, and levy and collect such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof as the Legislature may authorize, and in such manner as it may authorize the same for the following purposes, towit:
>
> "(a) * * * (b) * * * (c) The construction and maintenance and operation of macadamized, graveled or paved roads or turnpikes, or in aid thereof."

Article 627, Vernon's Texas Statutes, 1920, is as follows:

> "Any county in this State or any political subdivision or defined district now or hereafter to be described and defined of a county, is hereby authorized and empowered to issue bonds or otherwise lend its credit in any manner not to exceed one-fourth of the assessed valuation of the real property of such county or political subdivision or defined district thereof, and to levy and collect such taxes to pay the interest upon such bonds and provide a sinking fund for the redemption thereof for the purpose of constructing and maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof."

Article 631, Vernon's Texas Statutes, 1920, provides:

> "Bonds may be issued in such county or political subdivision or defined district thereof by the commissioners court of the county after an election has been held in which a two-thirds majority of the votes cast at such election were in favor of the issuance of the bonds."

The facts show that Road District No. 2 of Archer County, Texas, is composed of two of the commissioner's precincts of Archer County, "political subdivisions" of the county which were established, recognized and ascertained long before the beginning of this controversy.

Appellees submit that the Constitution of the State of Texas in effect created the district and fixed the tax. Appellees further contend that both the Constitution and the statutes of Texas did and authorized the doing of the things complained of by appellant. The precincts included in Road District No. 2 are political subdivisions of the County of Archer, and when thrown together they became a "defined district." The tax was fixed both by the Constitution and statutes in the provision that bonds should not be issued exceeding one-fourth the value of the real estate of the political subdivision or defined district. The question then arises whether the building of roads is of general benefit or whether the building of such roads has no general benefit to the public, but is theoretically for the benefit of those whose property may be contiguous to or in the neighborhood of the roads.

The facts in this case show that both of the roads sought to be improved in Road District No. 2 have been designated as State highways, and one of the roads has been selected and designated by the Federal Highway Engineer as recipient of Federal aid in the building of highways. Thus it is seen that these roads are of sufficient importance to the public generally until the State government has recognized both, and the Federal government has extended its recognition to one of them and both the State and Federal government will expend under the laws governing highways large sums of money in the improvement of these roads for the public and general good.

II.

Public roads in the State of Texas have always been State property over which the State has full control and authority. The Supreme Court of the State of Texas in the case of Robbins et al. vs. Limestone County et al., 268 S. W., 915, in a recent opinion delivered January 28, 1925, in discussing the general ownership and control of public roads by the State, said:

> "In their very nature and as exercised by the general sovereignty they belong to the State. From the beginning in our State the public roads have belonged to the State and not to the counties. This is clearly reflected in the Constitution and early decisions of this court. * * * While the title under the authority of law was taken in the name of the county and under statutory authority and the county was authorized and charged with the construction and maintenance of the public roads within its boundaries, it was for the State and for the benefit of the State and the people thereof."

Discussing the rights and powers of counties in relation to those of the State in Baker vs. Dunning, 77 Texas, 28, this court said:

> "The counties being but political subdivisions of the State and quasi corporations created by the State for the more convenient administration of its laws, we are inclined to the opinion that they hold their property as they hold their existence—at the will of the State; or at least what has been

given to them by the State for the purposes of government they hold in trust and that it is subject to be resumed by the State at its pleasure."

"Public roads are State property over which the State has full control and authority. This is clearly held in Travis County vs. Trogdon, 88 Texas, 302. In that case the issue was whether or not the taking of private property from an individual by a county for public road purposes, was for the use of the State and might be taken for that purpose without first, and in advance, having provided or designated compensation therefor."

The court said:

"Therefore, in requiring the compensation to be made or secured by a deposit of money an express exception was made of that class of cases in which property is taken for the use of the State. We are satisfied that this language includes condemnations for public roads by county commissioners courts, because as indicated above, such was its construction at the time it was incorporated into the Constitution of 1876, and because it is one of the functions of government to establish and maintain public roads, and no matter through what agency such function is authorized, the roads are the property of and for the use of the State, which through its legislature has absolute control over the same, which control it may or may not from time to time delegate to local authorities.

"The establishment of public highways being primarily a function of government belonging to the State, the right to establish them resides primarily in the legislature, and in the absence of constitutional restriction the legislature may exercise that right direct or delegate it to a political subdivision of the State or to such other agency or instrumentality, general or local, in its scope as it may determine. The exercise of this right by a political subdivision of the State or by local officers, is founded upon statutory authority therefor. The legislature may exercise possession of public roads and control over them, by or through such agencies as it may designate."

In the building of public roads benefit is presumed just as the building of schools and the levying of taxes to maintain same is

presumed to benefit the public generally. People without children are taxed in order that other people's children may attend school, and it is upon the same theory of presumed benefit that appellants' property is taxed in order that other people and the public generally may have the benefit of the roads to be built in Road District No. 2, Archer County, Texas.

In the language of the distinguished trial judge "such taxes are a part of civilization's toll."

The case of Wight vs. Police Jury, 264 Fed., 765, by the Fifth Circuit Court of Appeals, is almost identical with the case here. One difference being that in that case a master found that the proposed road would injure the complainant railroad company, whose property was made the center of and ran the entire length of the district. In this case there has been no finding and no proof that the construction of the roads in Road District No. 2 would injure complainant's property.

In Wight vs. Police Jury, the court said:

> "The laying out, the construction and maintenance of public roads are not matters to be determined with reference to benefits to particular individuals, but with reference to the interest of all those persons whose rights and property and general well being are the chief concern of the government. No person is entitled to specific notice of the formation of a road district in which the expense is to be met by a *general property tax*. He is not entitled to notice of an action which the law assumes equally affects all citizens. He is not entitled to notice in order that he may protest against the inclusion or exclusion of his property. The law contemplates that all of the property of the State may go into some district and it is for the law making power and not the individual property owner, to determine the boundaries of the district. He is not entitled to notice to enable him to show that the formation of the district with its possible tax, will bring him no benefit. *There is an absolute presumption of benefit from governmental activities of this character.*"

Thus we have not only the court of supreme authority in the State of Texas declaring that the building and construction of

public roads is a governmental function and one to be exercised by sovereignty, but we find that our Federal courts have upheld this contention. Other cases upholding this contention are: Dallas County Levee District vs. Looney, 109 Texas, 326; Holt vs. State, 176 S. W., 743; David vs. Timon, 183 S. W., 88; Ogburn vs. Barstow, 230 S. W., 1036; Wharton vs. Higbee, 149 S. W., 381; T. & P. R. R. Co. vs. Ward, 112 Texas, 539; Fallbrook Irrigation Dist. vs. Bradley, 164 U. S., 112; Kansas City Southern Ry. Co. et al. vs. Road Imp. Dist. No. 3, decided by the Supreme Court of the United States December 15, 1924.

III.

In Fallbrook Irrigation District vs. Bradley, 164 U. S., 176, the Supreme Court of the United States in discussing benefits to be derived by property owners from public improvements (in that instance, an irrigation district) said:

> "Some means of arriving at this amount must be used and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an ad valorem method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the State Legislature and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from taking property without due process of law."

In Walston vs. Nevin, 128 U. S., 578, an assessment was laid upon lands for benefits received from the construction of a local improvement according to the number of square feet owned by the land owner. It was urged that it was not an assessment governed by the amount of benefits received, but was an absolutely

arbitrary and illegal method of assessment. The Supreme Court held the objection not well founded and that the matter was for the decision of the Legislature, to which body the discretion was committed, of providing for payment of the improvement.

In Dallas County Levee District No. 2 vs. Looney, 109 Texas, 326, the Supreme Court of the State of Texas quoted with approval the following language from the Supreme Court of California in the case of Burnet, etc., vs. City of Sacramento, where it was declared:

> "The law in question avoids the injustice of general taxation for local purposes and lays the burden upon the recipients of the benefit. It apportions the tax according to the assessed cash value of the adjacent property, which is as near an approximation to an equitable rule as can be established. No rule could be adopted which would work absolute equality. An approximation to it is all that can be attained. The power of apportionment with the power of taxation is exclusively in the Legislature. The Constitution contains no inhibition to the tax and prescribes no rule of apportionment. Security against the abuse of the power rests in the wisdom and justice of the members of the Legislature and their responsibility to their constituents."

And declared that:

> "It cannot be said as a matter of law that a rule which apportions taxes of this character according to the value of the property affected, is one plainly arbitrary and unfair. It is a veteran rule for the apportionment of property taxes sanctioned by immemorial usage and universally applied. It is one most familiar to the people. Its general justice is not open to challenge. It is an approved method for the apportionment of taxes of this kind. Its adoption was a matter of legislative discretion."

It is fundamental, we think, that in the exercise of governmental functions no particular or special notice is required to be given to the individual whose property may be affected thereby. It is the province of the sovereignty to say how a State shall be divided and to determine what shall constitute a political subdivision, and also

to determine the machinery necessary for the proper operation and function of all governmental affairs. It is the theory of sovereignty that public education and transportation are for the general benefit of the public, regardless of any direct benefit that may or may not accrue to the particular individual, and it would be the duty of sovereignty to function in the establishment of public highways, even though their establishment might in some instances harm the individual to a greater extent that he would be benefited. In such instances the individual is not entitled to any special notice that the authority of the sovereign will be exercised.

Quoting again from Wight vs. Police Jury, 264 Fed., 705:

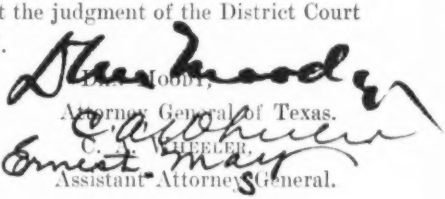
> "Complainant makes the proposition that the grant of power to the police jury violates the Constitution of the United States because no provision is made by which he, as a taxpayer, may be heard with reference to the advisability of action in the authority or in the manner in which the authority is to be exercised. There is no constitutional requirement of special notice to any particular individual of contemplated action of a general nature by a governmental body exercising general legislative or administrative functions. The taxpayer in a proposed road district has no more right to notice of a division of the State by the proper authority into road districts than to notice of the creation of a new parish or a district of the parish into justice wards.
>
> "The governmental functions are carried on in a public way. The forces which exist to compel conformity of action to public opinion are open to everybody. Except in those cases in which action is contemplated directly affecting the right of an individual as distinguished from action affecting the public generally; no person has more right to specific notice than all other persons. It is assumed that all people interested in public affairs will acquire a knowledge of what is taking place among those to whom the conduct of public affairs has been trusted. And so long as the officers are acting within their authority, redress or improper conduct is political instead of judicial. * * * In the leving of road taxes, as in all other taxes, some persons may pay small amounts in the way of taxes and receive great benefits, and other persons may pay considerable taxes and receive limited benefits. This in-

> equality is inherent in all taxation and in all governmental activities. While, however, there may not be equality in the benefit to be derived from roads, it is not that character of inequality which the law is capable of eliminating and not that character of inequality of which the Constitution takes cognizance. These road taxes are of the same general character as school taxes, held to be legal and to meet the constitutional requirements of inequality, notwithstanding many taxpayers are entirely without direct benefit."

Section 52, Article 3, of the Constitution of the State of Texas, as amended, and as it now exists, was adopted by the people of the State of Texas by vote. The statutes under which Road District No. 2, Archer County, Texas, was created, was enacted by the Legislature of the State of Texas, composed of representatives of the people, and in adopting the Constitution the people decided and the Legislature in enacting the statutes, considered that a road was a general benefit, and the people with notice have by their Constitution placed in the hands of the Legislature the control of the roads and the subdivision of the State into political subdivisions and road districts, and then in addition to all of this consideration given the subject the people of Road District No. 2 were called upon to pass upon the question by a two-thirds majority vote before the bonds could be issued and the tax levied upon complainant's property. Can it be said that there was any palpably arbitrary inclusion of plaintiffs' property in Road District No. 2, because no special notice was given to plaintiff of the creation of the district? Can it be said that there has been a plain abuse in the taxing of plaintiffs' property in Road District No. 2, Archer County, Texas, for road purposes when the property of every other individual in that district is taxed at a like rate for the same purpose, and when it is true, theoretically at least, that all property in the State has been included in some road district and taxed for road purposes so as to build up a system of highways connected with the roads to be built in Road District No. 2, and furnishing to complainants and to all other persons a system of highways throughout the State and of a means of transportation which unquestionably is of a

direct benefit, in a greater or lesser degree, to every person and locality and to every bit of property within the State of Texas? We think not.

We therefore respectfully submit that appellants are not entitled to the relief prayed for and that the judgment of the District Court should be in all things affirmed.



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IN THE

Supreme Court of the United States

OCTOBER TERM—1925.

No. 256.

PERRY BROWNING, WM. COLEMAN, JAMES E. DALE, *et al.*,

Appellants,

v.

E. M. HOOPER, E. A. McDONALD, A. L. BISHOP, *et al.*,

Appellees.

PETITION FOR REHEARING AND ARGUMENT.

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SUPREME COURT OF THE UNITED STATES.

No. 256.—October Term, 1925.

Perry Browning et al., Appellants, *vs.* E. M. Hooper et al.	Appeal from the United States District Court for the Northern District of Texas.

[January 4, 1926.]

Mr. Justice Butler delivered the opinion of the Court.

Appellants own taxable real and personal property in that part of Archer County, Texas, defined as Road District No. 2. The appellees are the county judge and four commissioners, (constituting the county commissioners' court) the tax assessor and the sheriff of the county, who is the tax collector. Appellants brought this suit to restrain the issue or sale of bonds of the road district in the amount of $300,000 proposed to be sold to obtain money for the construction, operation, and maintenance of roads in that district, and to restrain the levy or collection of any tax upon their property to pay any part of the interest or principal of the bonds. They seek relief on the ground that the creation of the road district and the enforcement of the proposed tax, will deprive them of their property without due process of law in violation of the Fourteenth Amendment. The District Court dismissed the complaint. 3 F. (2d) 160. The case is here on direct appeal. § 238, Judicial Code.

The Texas statutes (Vernon's Complete Texas Statutes, 1920) provide: "Any county . . . or any political subdivision or defined district, now or hereafter to be described and defined, of a county," is authorized to issue bonds, not to exceed one-fourth of the assessed valuation of real property in the district, for the construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, and to levy and collect taxes to pay them. Art. 627. Upon the petition of 50 resident property taxpaying voters of any defined district of any county, it is the duty of the commissioners' court to order an election in the district as described

in the petition to determine whether its bonds shall be issued for such road purposes, and whether a tax shall be levied upon the property of the district for their payment. Art. 628. If two-thirds of the votes cast are in favor of the proposition, the commissioners' court is required to issue and sell the bonds. Art. 631. But before they are put on the market, the court is required to levy a tax sufficient to pay the debt as it matures. The assessments are to be made on the same valuation, and they become liens and may be enforced in the same manner as state and county taxes. Arts. 634, 2827, 2836. For the purposes of the act, any district accepting its provisions by such vote is thereby created a body corporate which may sue and be sued. Art. 637.

Archer County is about 30 miles square, and has a population of between 5000 and 6000. The principal place is Archer City, the county seat, located about five miles south and three miles east of the center of the county. Road District No. 2 embraces approximately the northerly half of the county, including a part of Archer City. The Ozark Trail is a federal aided state highway, and about 20 miles of it extends diagonally across the northwesterly part. Dundee is located on it about two miles from the west line of the county. There is a highway extending from that place to Diversion Dam about six miles northwest. About 18 miles of the Southwest Trail lies between Archer City and a point on the north line of the county about six miles from its northeast corner. There is another highway extending from a point on the Southwest Trail about two miles south of the county line to Holliday on the Ozark Trail about six miles west. These roads are within the road district, and the bonds issued are to raise money to improve them.

January 17, 1924, there was presented to the commissioners' court a petition signed by 74 persons. It prayed an election to determine whether bonds of the territory, therein described by metes and bounds, and to be designated as "Road District No. 2 of Archer County, Texas", should be issued for road purposes in the amount of $300,000; and whether a tax should be levied upon the property therein to pay the bonds. The commissioners' court by order established the district within the metes and bounds and for the purposes set forth in the petition, and declared it to be a body corporate. On the same day the court fixed the time and place for an election. Its result was 303 votes for and 102 against the

bond issue. Thereupon the court ordered the bonds to be issued, and levied the taxes. Before the election was called, the court determined that the proceeds of the bonds, if voted, or so much as might be necessary, should be expended for the roads above described.

The appellants' lands—24,900 acres in all—are in the northeasterly part of the county. All but one of the petitioners are residents of the part of Archer City that is within the road district. Archer City, Dundee and Holliday, furnished 252 votes for the bond issue,—more than twice the number cast against it. Nearly all the votes cast in the northeasterly part of the county were negative. The taxable property in the district is assessed at $5,683,359, of which $257,080 belongs to appellants, and $111,388 to petitioners; and $60,500 of that amount belongs to one signer, leaving only $50,888 to the other 73. The part of the district in which appellants' lands are situated is tributary to Wichita Falls, which is outside Archer County, but near its northeast corner. The evidence persuasively supports appellants' contention that the improvements of the roads designated will not benefit their property. Moreover, the inclusion of their lands in that road district makes it impossible until the last bonds mature 30 years hence, to create another road district to raise money for the improvement of roads needed to serve the territory in which their lands are situated. Art. 637d.

Resort may be had to general taxes and to special assessments to raise funds for the construction or improvement of roads. *Missouri Pacific Railroad* v. *Road District*, 266 U. S. 187, 190. The proceedings in this case cannot be sustained as the levy of a general tax. The commissioners' court is authorized to levy general taxes for road purposes up to a stated maximum on each $100 valuation. Art. 2242; Constitution Art. VIII, § 9. The expenditure of the moneys so raised is not limited to any specified roads. And it is significant that, in the case of a road district, the court's duties in respect of the amount to be raised and the lands to be subjected to the charge are purely ministerial, and confined solely to carrying out the will of the petitioners when approved at the election. Here, on the initiation of individuals signing the petition, a special district was carved out to furnish credit and to pay for specified improvements on designated roads wholly within the territory selected. The purpose was special, and the district will

cease to exist as a body corporate upon the payment of the bond debt. It is clear that the burdens here sought to be imposed on appellants' lands are special assessments for local improvements. *Embree* v. *Kansas City Road District*, 240 U. S. 242, 247; *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190, 197, 209.

The legislature did not create the road district, levy the tax or fix the amount to be raised. Under the act, road districts are not required to correspond with or to include any political subdivision. *Moore* v. *Commissioners' Court*, (Tex. Civ. App.) 175 S. W. 849; *Bell County* v. *Hines*, (Tex. Civ. App.) 219 S. W. 556. There is nothing in the law to guide or to limit the action of the signers of the petition in selecting property to be assessed. Subject to the vote of a district of their own choice, the petitioners' designation is absolute. The commissioners' court has no power to modify or deny; it is bound to grant the petition. *Huggins* v. *Vaden*, (Tex. Civ. App.) 253 S. W. 877, 878; 259 S. W. 204, 206; *Meurer* v. *Hooper*, (Tex. Civ. App.) 271 S. W. 172, 176. And when the required vote is given, the court, once for all, must make a levy on the taxable property of the district sufficient to pay the entire debt as it matures. The opinion of the District Court states that the road district "was composed of two of the precincts of Archer County—'political subdivisions' of the county well recognized and ascertained long before the controversy." We find nothing in the record to support the statement. But, if true, it does not tend to show that the legislature created the road district. A political subdivision is not a "defined district" within the meaning of the Texas Constitution (Art. III, § 52) or of the act. It has been held by the Texas Court of Civil Appeals that a "defined district" means a defined area in a county, and less than a county, other than a political subdivision of a county. *Bell County* v. *Hines*, *supra*, 557. The fact that the metes and bounds describing the road district happened to coincide with the external boundaries of two adjoining commissioners' precincts does not support the contention that the road district was created by the legislature. For the election of commissioners, each county is divided into four precincts, from each of which a commissioner is elected. These precincts are not defined by the legislature, but by the commissioners' courts. Art. 1356; Constitution, Art. V, § 18. They are political subdivisions, but, unlike road districts, they are not bodies corporate. See *Ex parte Haney*, 51 Tex. Cr. Rep. 634; *Cofield* v.

Britton, (Tex. Civ. App.) 109 S. W. 493, 496. They are not taxing or assessment districts; their powers and functions are wholly different from those of a road district. And plainly, the authority granted (Art. 627) to issue road bonds up to one-fourth the assessed valuation and to levy taxes ratably to pay them is not a legislative determination of the rate or amount of the tax imposed on appellants' property. The amount of the bonds to be issued and the property to be taxed are the elements which determine the burden. These were fixed by the petition and election. The legislature may make assessments for local improvements ratably on the basis of property valuation (*Valley Farms Co.* v. *Westchester,* 261 U. S. 155); but, where the amount to be raised is determined and the property to be assessed is selected as in this case, the requirement that the burden shall be so spread is not a legislative assessment.

Where a local improvement territory is selected, and the burden is spread by the legislature or by a municipality to which the State has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits. *Valley Farms Co.* v. *Westchester, supra; Hancock* v. *Muskogee,* 250 U. S. 454, 459; *Withnell* v. *Construction Co.,* 249 U. S. 63, 69; *Wight* v. *Police Jury,* 264 Fed. 705. But it is essential to due process of law that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the legislature, and there has been no legislative determination that their property will be benefited by the local improvement. Appellants were denied all opportunity to be heard. No officer or tribunal was empowered by the law of the State to hear them, or to consider and determine whether the road improvements in question would benefit their lands. The act is repugnant to the due process clause of the Fourteenth Amendment. *Embree* v. *Kansas City Road District, supra,* 251.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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IV. The decision in the instant case is in conflict with a long line of decisions by this Court.

The procedure adopted by Texas in organizing road districts and issuing bonds, is not only justified by the decisions of the Courts, but is sanctioned by a line of decisions of the Supreme Court of the United States sustaining bonds and taxes over a period of fifty years. No question as to the validity of the districts or the regularity of the procedure has been suggested in these decisions 69

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IN THE

Supreme Court of the United States

OCTOBER TERM—1925.

PERRY BROWNING, WM. COLEMAN, JAMES E. DALE, *et al.*, Appellants, v. E. M. HOOPER, E. A. MCDONALD, A. L. BISHOP, *et al.*, Appellees.	No. 256.

PETITION FOR REHEARING AND ARGUMENT.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Dan Moody, Attorney General of the State of Texas, respectfully shows that your petitioner is the Attorney General of Texas, and the successor in office of the Hon. W. A. Keeling, named in the Bill of Complaint herein and upon whom notice was served; that your petitioner has appeared herein as attorney and of counsel for the defendants in this action; that this Court has heretofore given him leave to petition for a rehearing and this petition is filed pursuant to the leave so granted.

Your petitioner further represents and states to the Court that the opinion in this action declares

to be unconstitutional a statute of the State of Texas; that under that statute and other statutes of the State of Texas, it is made the duty of the Attorney General of the State to examine the proceedings in relation to issues of bonds made under the provisions of acts of the Legislature; that a very large amount of securities has been so issued and that all of these securities issued by defined districts of counties are brought in question by the decision of this Court in this action.

Your petitioner also respectfully shows and represents to the Court, that the State School Fund of the State of Texas holds a large amount of bonds issued by Road Districts of the State of Texas, organized under the statute so held to be unconstitutional; that the decision of this Court in this case casts a cloud upon the validity of the above securities, and seriously affects the marketability of the same, and the value thereof as an investment.

That since the opinion in this case was handed down on January 4, 1926, it has received great publicity and your petitioner has been advised by counsel and by bankers that large amounts of securities issued by districts in other States are seriously affected by the opinion of the Court herein.

Your petitioner also respectfully shows to the Court that, since the opinion herein was handed down, the principles embodied therein, the practice under the act of the State Legislature of Texas, which was before the Court, and the decisions and practice in other States, have been the subject of much investigation and discussion and your petitioner respectfully represents to the Court that such investigation and discussion have made it appear that the arguments on behalf of the de-

fendants and appellees herein to sustain the organization of the District and the validity and regularity of the tax voted to secure the payment of the bonds herein, were not adequately and fully presented.

Your petitioner further respectfully represents to the Court that the opinion herein indicates that this Court has reached the conclusion that by the action of individual property taxpayers, a special district was carved out to furnish credit to pay for specified improvements on designated roads; that the existence of the district, continuing during the term of the proposed bonds, will prevent the improvement of roads needed to serve the territory in which the plaintiffs' lands are situated; that the purpose is special and that the burdens sought to be imposed on appellants lands are special assessments for local improvements; whereas, your petitioner respectfully shows to this Court, that this construction is erroneous and contrary to the decisions of the Courts of the State of Texas and the recognized and accepted practice of the officials of said State in proceedings under the act. Your petitioner further respectfully shows that according to the accepted practice and according to the decisions of the State of Texas, roads are not designated as a part of the petition for the creation of a district and the issuance of bonds; that the designation of the roads is a matter within the discretion of the County Commissioners Court and such roads need not be designated otherwise than by directing of the expenditure of the moneys raised by the issuance of bonds; that such discretion may be exercised at such time and in such manner as the Commissioners Court deems best in the public interest; that the County Commissioners Court is

not deprived of discretion as to the boundaries of the District, but that it is its duty to enter an order fixing such boundaries and in so fixing the boundaries, it is obliged to conform to the law, including those decisions of this Court which say that no district can be formed so as to arbitrarily deprive a man of his property without due process of law.

Your petitioner also respectfully shows to this Court that in his opinion, it is within the discretion of the County Commissioners Court to fix such boundaries as it may deem proper and appropriate and if the petition before the Court does not apply to such boundaries, then the petition must either be amended or denied. Your petitioner further respectfully represents to this Court that a single issue of bonds does not exhaust the power and authority of the District; that it is within the power of the property taxpaying voters to present further and additional petitions proposing the issuance of additional bonds; that this course may be followed by successive petitions until securities have been issued to the ultimate limit of twenty-five per cent of the assessed value of the real property of the District, and the proceeds may be expended in the same manner on such roads as the Commissioners Court deems most to the public interest.

Your petitioner further respectfully shows to the Court that the petition in this case has not for its primary purpose the making of the improvements, but rather the raising of money by which improvements may be made; that the purpose of the act is to authorize counties, political subdivisions thereof and defined districts thereof, to borrow money and to lend their credit for public purposes; that the tax to be levied is a tax which is appropriate and

suitable for an issue of securities which are to be disposed of in open market; that such a tax is usually and generally a general *ad valorem* tax and is not a special assessment based upon a local improvement.

Your petitioner further respectfully shows to the Court that the obligations created by the issuance of bonds of defined districts must be met from the tax provided whether the improvements have been built or not; that the obligation constitutes a corporate debt which must be paid in any event, without regard to the benefit of the property owner; that the roads and highways which are to be improved form a part of the State and County system of highways; that the defined district as such, has no power and jurisdiction over the improvement thereof, but the proceeds of the bonds are to be paid over and delivered to the County Commissioners Court and are to be by it expended in the same manner as other moneys raised for the improvement of public highways, i. e., in the improvement of such highways within the district as best suits the interests of the community, and not in the improvement of highways for the purposes of benefitting any individual or set of individuals.

Your petitioner further respectfully shows that by the proceedings of the property taxpaying voters, the order of the County Commissioners Court defining the District, and calling the election, and the vote of the property taxpaying electors, a public or quasi-municipal corporation has been created with powers conferred thereon by statute of Texas; that such creation and grant of powers only raise questions under the laws of the State of Texas, and do not present any Federal question; that it is within the power of the State

of Texas to confer upon the corporation so created the power of general taxation *ad valorem* for highway purposes without any relation to the benefits; that such power has been so conferred; and the conferring of such power does not present any question under the Fourteenth Amendment to the Federal Constitution.

Your petitioner further represents that he believes that if the foregoing reasons had been properly and adequately presented to the Court, a decision holding said statute unconstitutional would not have been rendered, but on the contrary the validity of the statute would have been sustained.

WHEREFORE, your petitioner respectfully prays that a rehearing of the appeal herein be ordered, and in support of the prayer of this petition for such rehearing, he respectfully submits to the Court the following

ARGUMENT.

I.

The Court erred, we respectfully submit, in certain important particulars, in its construction of the purpose and effect of the Texas statutes.

In its opinion, this Court has indicated that a special district was created to furnish credit and pay for

(a) specified improvements;

(b) on designated roads wholly within the territory selected;

(c) that the district will cease to exist as a body corporate upon the payment of the bond debt.

(d) that the inclusion of the plaintiff's lands in the road district, makes it impossible until the last bonds mature, thirty years hence, to create another road district and raise money for the improvement of roads needed to serve the territory in which their lands are situated; or shortly stated, that the creation of this district and the issuing of its bonds will prevent the improvement of roads immediately adjoining the plaintiffs' real estate;

(e) that the Commissioners Court has no power to modify the petition, but must order a vote in a district of the choice of the petitioners;

(f) that the Commissioners Court *once for all* must make a levy on the taxable property of the district sufficient to pay the entire debt as it matures;

(g) that this is a local improvement territory and that the burdens are special assessments for local improvements.

We submit that the opinion of the Court is erroneous in each of these particulars.

Certain facts appear in the record and in the opinion of the Court which we desire to call to the attention of the Court.

There is no evidence of a "gerrymander". The opinion of the Court says that Road District No. 2 embraces approximately the northerly half of the County. It appears from the opinion of the Court below, probably from local knowledge or informal concession as the fact does not appear otherwise

from the record that the District includes the whole of two Commissioners Precincts. For the purpose of electing the County Commissioners, the County is divided into four Commissioners Precincts. The territory of the District is approximately eighteen miles north and south, and thirty miles across, extending from Archer City to the northerly boundary of the County. No evidence of gerrymander appears in its form; the substantial proportion of the county being more than one-half, or approximately 500 square miles, negatives the idea that its boundaries were fixed merely with the ulterior object of imposing taxes upon any particular property holders.

The roads to be constructed are public enterprises and not merely local. The Ozark Trail is a Federal aid road. The Southwest Trail is a State highway, being constructed with the aid of the State (Transcript, fol. 69). Parenthetically, it may be mentioned that the "Ozark" and the "Southwest" Trails are both main highways in a national sense. The "Ozark", we believe, begins at St. Louis, passes through Oklahoma and Texas to New Mexico, and thence on to California. The "Southwest" extends from the State of Oklahoma across Texas to Corsicana, Texas, on the Gulf coast. The other two roads connect important parts of the district with these important highways. Neither a Federal aid road, nor a State highway can be accurately described as "local improvement". They are public enterprises of the State and Nation, and are not constructed merely for the sake of giving access to or improving the lands of individual property owners.

The Act of Congress of November 9, 1921, Chapter 119, Section 6 (42 Stat. 213), defines the character of roads for which Federal aid may be given. The aid is given because they are "post" roads, the title of the act being:

> "An Act to provide that the United States shall aid the States in the construction of rural post roads and for other purposes."

In giving Federal aid, preference must be given

> "to such projects as will expedite the completion of an adequate and connected system of highways, interstate in character."

The State, through its State Highway Department, must select or designate a system not to exceed seven per centum of the total highway mileage of the State. Upon this system all Federal aid apportionment shall be expended. The highways which receive Federal aid shall be divided into two classes, the first being known as "primary or interstate highways" and the second being "secondary and intercounty highways" "which shall connect or correlate" with the primary or interstate highways.

The Ozark Trail belongs to these classes. It is well known that it is intended as a transcontinental or interstate highway. It is scarcely possible to describe this highway as a local improvement constructed for special purposes.

By an act of 1917 (Acts 1917, p. 416), the State Highway Engineer is directed to prepare under the direction and with the approval of the State Highway Commission, a comprehensive plan, providing a system of State highways. By Section 2 of Chapter 186, General Acts, 1925 (p. 456), all highways

included in the plan as prepared by the State Highway Engineer pursuant to the statute cited, "are hereby designated as the State Highway System." By Section 3 of that Act, the County Commissioners Court of each County is authorized to aid the construction and maintenance of any section or sections of any highway constituting a part of the State Highway system and

> "any moneys in the available road fund of the County or any political subdivision or defined district thereof, may be appropriated for the purpose of granting such aid hereinafter designated as 'County Aid'."

By section 4 of the Act of 1925, no further improvement of the State Highway can be made under the direct control of the Commissioners Court of any County, unless and until the plans and specifications for the improvement have been approved by the State Highway Engineer.

It thus appears that both the Southwest Trail and the Ozark Trail have been designated by the State Highway Department for improvement as State Highways, for the first of which Federal aid has been obtained, and that the improvement of these highways has not been undertaken exclusively by the citizens of Road District No. 2. A contribution to the cost of the improvement by the State of these highways is all that the citizens of Road District No. 2 have undertaken. The enterprise is national in its character as well as State-wide in the case of both highways.

The tax on the plaintiffs' property is negligible. Plaintiffs' property consists of 24,900 acres. The assessed valuation thereof is $257,080. This rep-

resents an assessed value of approximately $10.33 for each acre of the plaintiffs' property. The tax levied for the first year is at the rate of 43 cents per $100 which on an assessed value of $10.33 per acre, equals 4.17 cents per acre. Bonds are to run for thirty years, and the total annual taxes payable by each individual acre during these thirty years on present assessment, will only aggregate $1.25. In other words, spread over a period of thirty years, the tax per acre is trivial and negligible. There is no element of hardship, oppression or confiscation.

The view of the Court is summed up in the following quotation from the opinion:

> "On the initiation of individuals signing the petition, a special district was carved out to furnish credit and to pay for specified improvements on designated roads wholly within the territory selected. The purpose was special, and the district will cease to exist as a body corporate upon the payment of the bond debt."

The contention of your petitioner is, that Article 3, section 52 of the Texas Constitution as amended in 1904, and the statutes, provide for the creation of incorporated general taxing districts, in which, by voluntary act of the resident property taxpaying voters, evidenced by a two-thirds vote, a general *ad valorem* property tax on all the taxable real and personal property in the district, as ascertained by the State and county assessment, may be levied to pay debts for public improvements of general benefit to the district as distinguished from the individual property owners.

This view is diametrically opposed to that expressed in the opinion of the Supreme Court, and

if correct, requires, we respectfully submit, a rehearing in this matter.

A. The Purpose of the Constitutional Amendment of 1904.

Prior to 1904, counties in Texas were afflicted by a tax limit which was not even sufficient for the upkeep of dirt roads and which would not permit of permanent improvements. With the advent of the automobile came a loud urging for more and better roads. The 1904 amendment to the Constitution, Art. III, sec. 52, was thereupon adopted to provide for bonds and taxes to construct five different kinds of improvements. Texas had two hundred and fifty counties, and it is one thousand miles across the State. The variety of purposes was brought about by physical and climatic conditions. The Gulf Coast needed reclamation; the Panhandle needed irrigation. The only all pervading need was highways. Roads were as universally wanted as school houses. And so the people provided a method of building roads by which counties, political subdivisions and defined districts might lend their credit and issue bonds payable from *ad valorem* taxes on all the taxable property in the county, subdivision or district. These roads are a part of the general State and County highway system. The taxes are levied on the same basis as all the other taxes for road purposes, namely, on both real and personal property.

In *Aransas County* v. *Coleman-Fulton Pasture Co.*, 108 Tex. 216, 191 S. W. Rep. 553, PHILLIPS, C.J., said (191 S. W., p. 555), that the amendment of 1904 to section 52 of Article 3, marked a radical departure from the previous policy of the State;

that it was the response to public demand that provision might be made whereby the State and each locality might be supplied *"through voluntary taxation"* with adequate, durable and permanent roadways. He added:

> "The former bounds of taxation for their construction and maintenance were set aside, and the political subdivisions named, in addition to all other debts, were, under legislative provision, given authority upon a requisite vote to issue bonds in the liberal amount of one-fourth of the assessed valuation of the real property of such districts. * * * Different units for the necessary taxation, and therefore different units as the beneficiaries of the taxation, from those theretofore existing, were thus authorized. It was plainly designed that the extent of the improvement should not be limited alone to the necessities of a county, nor was it to be longer dependent alone upon the powers of a county. The purpose of the amendment was a broad one, its scope was large, its spirit liberal."

In other words, in adopting the constitutional amendment, the people had taken into consideration the needs of the entire State and not the needs of the particular localities. It was intended to permit improvement wherever voluntary taxes might be levied. In the case cited, PHILLIPS, C.J., concludes:

> "In a word, the purpose of this amendment plainly was to provide the means of building and maintaining not alone neighborhood, precinct or even county roads, but adequate road systems throughout the entire State, to be availed of by larger or smaller areas as might be desired, so as to afford through the exercise of a liberal taxing power widely distrib-

> uted, adequate and continuous highways through every section of the State. Such a purpose stands out, boldly, we think, in the broad and sweeping provisions of the amendment."

This is a declaration by the highest court of Texas, that the purpose of the amendment and necessarily the purpose of the statute enacted to carry it into effect, are not limited to benefit to particular pieces of property in connection with a particular improvement, but that they are intended to operate upon the general highway system of the State for the benefit of the State as a whole, and of course, for the benefit of the territorial unit in which the highways are constructed, but not for the special and peculiar benefit of particular property owners therein.

For almost twenty years taxpaying electors have voted district road bonds, coupled with a levy of *ad valorem* taxes to pay them, and until the decision in this case, paid such *ad valorem* taxes to redeem their obligations. The Legislature has never yet sought to provide for the construction of rural highways by taxes of any nature, other than *ad valorem* taxes. In the rural districts no machinery exists for the construction of a highway on the basis of benefitting the property through which it runs. No machinery exists by which the benefit to the abutting property may be determined. No machinery exists by which a special assessment based upon benefits may be imposed, and the only highway system which exists in the rural districts of Texas, are those highways which form an integral part of the State and county highways.

The purpose of the act is not to create a means of improving *specified* highways within the district,

but to provide a means by which the property tax-paying voters may raise money by voluntarily taxing themselves for the purpose of constructing or aiding the construction of such highways within the district as the County Commissioners Court may, in its discretion, select.

(B). Designation of Highways not required.

There is no statute which, at any stage, requires the roads to be designated for the information of the voters. In constant practice, defined districts have been formed, bonds and taxes voted, and the bonds sold and issued, and the moneys turned over to the County Commissioners Court to be expended in its discretion on such roads as it may deem best.

That the regular practice under section 52 of Article 3 of the Constitution as amended, and the statute before the Court, is to designate the roads after the bonds have been voted, is shown by the decision of the Texas Supreme Court in *Limestone County* v. *Garrett* (Tex.), 236 S. W. Rep. 970. In that case, the Legislature, purporting to act under the express power conferred by section 9 of Article 8, passed a local law for Limestone County. The first section adopted the general law relating to the issuance of bonds of counties, political subdivisions and defined districts thereof. Section 5 provided for the creation of a Board of Permanent Road Commissioners for road districts voting bonds. *After the bonds had been voted,* a dispute arose between the Permanent Road Commissioners for Road District No. 15 of Limestone County, and the County Commissioners Court. The Court attempted to supersede the action of the Road Commissioners and designated other roads for the im-

provement. Thereupon, the Board of Permanent Road Commissioners sued to enjoin the County Commissioners Court from spending the money on any roads except such as were designated by the Board of Permanent Road Commissioners. The Court held that the Legislature could not by special act create officers for the Road District in violation of the provisions of section 56 of Article 3 of the Constitution prohibiting local or special laws "creating officers".

But no doubt was expressed as to the validity of the statute or the regularity of the election. This case illustrates the time when, according to the general practice, the roads are designated in applying the provisions of the law.

In *Black* v. *Strength*, 112 Tex. 188, 246 S. W. Rep. 79, in the case of county bonds issued under the same statute, the plaintiff sought to enjoin the expenditure of money for roads other than those designated by the County Commissioners in an order made *thirty days after the election was ordered*, but five days before the election. GREENWOOD, J., said that it was within the power of the Commissioners Court to designate by appropriate order passed at a regular session and entered on the minutes, what roads were to be improved with the proceeds of legally authorized bonds.

> "Not only is there nothing inconsistent between the order for the election and the subsequent order, but some such order as the latter was essential to attain the end which the election was designed to accomplish. That the order was made before the election conditioned on the bonds being voted, cannot be urged as a just ground of attack. * * * The court was not binding itself to a certain course of action in the future. It was instead making a pres-

> ent designation of highways to be improved with the proceeds of the bonds should same be voted, issued and sold."

This case clearly implies that the roads might have been designated by the County Commissioners Court after the election was held. The order before the court was made long after the election was ordered. This decision is inconsistent with the views expressed by the learned Justice in the present case that under the act, a defined district has been carved out

> "to furnish credit and to pay for specified improvements on designated roads."

In *Grayson County* v. *Harrell* (Tex. Civ. App.), 202 S. W. Rep. 160, a case which involved a post-election dispute as to the particular road upon which the proceeds of county bonds issued under the same statute should be expended and where the election order was silent as to the particular road and the plaintiffs relied on collateral and extraneous agreements not appearing of record on the minutes of the County Commissioners Court, the court said:

> "The power to provide for the improvement of public roads is a legislative function which has been delegated to the Commissioners' Court. This power is to be exercised for the *general good of the public, and not in the interests of any community or individual.* The court cannot delegate the exercise of this power and discretion to others, nor can it divest itself of such power by agreements in advance to exercise such discretion in any particular manner."

The *italics* are ours throughout this argument unless otherwise indicated.

In *Wright* v. *Allen* (Tex. Civ. App.), 257 S. W. 980, the Court held that pre-election orders made by the Commissioners Court as to the construction of roads out of proceeds of the voted bonds should be construed so as to reserve the right to make such changes in location as in the judgment of the County Commissioners Court, would be necessary, so long as the work as contemplated would be in substantial compliance with such pre-election orders.

Cannon v. *McComb*, 268 S. W., 999 (Writ of Error dismissed by Supreme Court for want of Jurisdiction) involved the construction of a road in Jack County out of the proceeds from the sale of County bonds voted and issued under this statute. The court held that since

> "discretion to expend the money derived from the sale of the road bonds was vested in the Commissioners Court by statute,"

in order to warrant the granting of an injunction to control their action, it was necessary that the complaint should contain specific allegations of all material and essential facts and the facts so alleged should be sufficiently certain to negative every reasonable inference arising from the facts stated from which it might be deduced that plaintiffs were not entitled to the relief sought.

The Texas Court of Civil Appeals in the case of *Adams* v. *Mullen*, 244 S. W. 1083, held that the order of the Commissioners Court declaring the result of a county road bond election, under this statute, and authorizing the issuance of such bonds for the construction of roads "within and for" the county, was not at variance with the notice of such bond election providing for the construction of

roads "throughout" the county, since, in any event, the Commissioners Court is left to exercise its sound discretion in its selection of the roads to be improved. The court said:

> "The use of the phrase, 'throughout the county', meant no more or less than the phrase subsequently used, 'within and for the county', and whether either of these phrases had been used, or not, the power was lodged in the commissioners' court, in the absence of a showing of a gross abuse of discretion, to devote the funds derived from the bond issue to the construction of the one paved highway in a 'direct line across the county' of which appellants complain. *Aransas County* v. *Pasture Co.*, 108 Tex. 216, 191 S. W. 553; *Grayson County* v. *Harrell* (Tex. Civ. App.), 202 S. W. 160, and authorities cited."

(C). *Boundaries of Defined Districts.*

Texas Revised Statutes, 1911, Art. 628, requires the petition of the resident property taxpaying voters. There is no requirement that the petition shall define the boundaries of the district, and districts have been formed where the boundaries were defined not in the petition, but by action of the County Commissioners Court irrespective of the petition entirely. Art. 628 does not prescribe what the petition shall contain. The election is ordered and the order must state the amount of bonds proposed, the rate of interest, the date of maturity, and under an amendment passed eight years after the statute was first enacted, the order and notice of election must also describe the boundaries of the District

> "as described and defined in the order of the County (Court) establishing such political subdivision or defined district of the county."

In *League* v. *Brazoria County Road District No. 13*, (Tex. Civ. App.), 187 S. W. Rep. 1012, the court said:

> "The determination of the area of the district, the sufficiency of the petition, and other prerequisites to the establishment of a valid road district was a matter peculiarly committed to the commissioners' court, and the motives of the persons who set the machinery in motion leading to the creation of the district cannot control nor be taken into consideration."

This case was decided in 1916, prior to the amendment of 1917, which required the order and notice calling the election to describe and define the boundaries of the District as they are described and defined in the order of the County Commissioners Court establishing such district. (Art. 628). The decision consequently shows that independently of the amendment, it has always been the rule that the bounds of the district are peculiarly a matter for the determination of the County Commissioners Court.

The organization of a district which is a palpable gerrymander, and the boundaries of which are formed for the purpose of subjecting some property owner to unreasonable taxation, is against the law.

> *Gast Realty & Investment Co.* v. *Schneider Granite Co.*, 240 U. S. 55;
> *Kansas City Southern Ry.* v. *Road Imp. Dist. No. 6*, 256 U. S. 658;
> *Kansas City Southern Ry.* v. *Road Dist.*, 266 U. S. 379.

Consequently, if this district was petitioned for with the purpose of taxing the plaintiff's

property the County Commissioners Court was not bound to enter an order defining it, but it was its duty to obey the law and to refuse to enter such an order.

This is sufficient to show that the County Commissioners Court was not, in this case, or in any other case which might come before it, controlled by the boundaries stated in a petition by the property taxpaying voters, and if this district was unreasonably laid out, was not obliged to define its boundaries or to order the election.

In support of their contention that the Commissioners Court was obliged to lay out a district with boundaries conforming to the petition, the appellants cited in their brief the cases of *Huggins* v. *Vaden*, 253 S. W. 877, 259 S. W. 204 (1923), and *Meurer* v. *Hooper*, 271 S. W. 172. We have been unable to find in these cases anything which says that the Court was obliged to accept the boundaries. We grant that a mandatory duty lay on the Court to act, but the statute does not control the manner in which the Commissioners Court must act, nor do the cases cited say that its action is controlled by the terms of the petition.

In *Huggins* v. *Vaden, supra,* two petitions were presented, the petition for Road District No. 2, being presented before the petition for Road District No. 5. The territory defined for District No. 5, embraced part of District No. 2. The Court chose to act upon petition for District No. 2 first and refused to act on District No. 5 unless the boundaries were changed by amendment. The case recognized that there was some degree of discretion. There was no suggestion at any place, that it was not within the power of the County Commissioners Court to entertain an amended petition.

Similarly, in *Meurer* v. *Hooper, supra,* two petitions were presented, one for Road District No. 1, which included a part of Road District No. 2; the other for Road District No. 2. The petition for Road District No. 1 was first presented. Attorneys claiming to represent the petitioners, asked to amend it in material respects. This request was denied because there was no sufficient evidence of their authority to make the change. On the same day, the Court ordered an election to be held in District No. 2. The whole argument of the Court in its opinion is on the basis that the Commissioners Court had a discretion as to which District might be first formed and what the boundaries should be of the defined territory, or whether both might not be formed by changing the boundaries of District No. 2, to avoid overlapping districts. In other words that the whole matter was within the discretion of the Commissioners.

These decisions have been cited by the plaintiffs and appellants herein. We respectfully submit that they are not authority for the propositions stated in plaintiff's brief.

Moore v. *County Commissioners Court of Bell County* (Tex. Civ. App.), 175 S. W. 849, also cited by plaintiffs, involved an issue of county bonds, and did not bring in question the defining of a district. The language used was only by way of discussion and illustration and does not support the idea that if the district described in the petition is arbitrary and unreasonable, or against the interests of the County, it must nevertheless be accepted by the County Court.

We concede it was the mandatory duty of the County Commissioners Court to act upon the petition when presented, but that mandatory duty did

not control the manner in which it should so act. The Court might have denied the petition to define the boundaries. It might have changed the boundaries. It might in our view, have selected entirely different boundaries, with the result that the question would be presented whether there was any petition before the Court which applied to the territory as defined by the Court. According to our reading of *Huggins* v. *Vaden, supra,* and *Meurer* v. *Hooper, supra,* these views are not inconsistent with the rulings of the Court in these cases.

The Constitutional amendment and the statute should be liberally construed and applied. They were adopted to meet the needs of a rural population which from the inception of the State, had been accustomed to govern itself. The petition was not presented and acted upon secretly and without previous discussion. It had been talked over for months before (Tr., fols. 70, 74). Competing petitions were presented and evidently the whole dispute grows out of the failure of the plaintiff,s who also petitioned for Road District No. 1, to impose on the Commissioners Court their wishes and to bring about the defining of a district such as they desired.

In most cases, defined districts are created and the election ordered without contest, and the district asked for in the petition is the only district before the Court. In the absence of anything arbitrary and unreasonable, the Court naturally orders the creation of the District with the boundaries as defined in the petition. Although it is mandatory upon the Court to act upon a petition, and although in a great majority of cases, the petition defines boundaries which are acceptable to the community, it does not follow that the Commissioners Court is

obliged in every case to accept the boundaries proposed. The idea that the Court must accept the boundaries disclosed in the present case may have sprung from the fact that some action is mandatory and usually the District proposed is accepted by the Commissioners' Court without question, but a mistake of the law in a particular case is no ground for holding the statute unconstitutional, nor is it ground for setting aside the action of the Court, if after all the Court acted for the best interests of the County and District. We respectfully submit that the natural presumption must attach that, as the Commissioners' Court has the duty to define the boundaries of the District, it is its duty to adopt such boundaries only as are in the public interests.

(*D*). *Application of the Proceeds.*

After the bonds have been voted, they are required to be submitted to the examination and approval of the Attorney General and registered by the State Comptroller

> "and the purchase money therefor shall be placed in the County treasury of such County to the credit of the available road fund of such county or of such political subdivision or defined district of such county, as the case may be * * * Such funds shall be paid out by the County Treasurer upon warrants drawn * * * upon certified accounts approved by the Commissioners Court of the County when such funds belong to the entire County; and when such funds belong to a political subdivision or defined district of the County, they shall be paid out by the County Treasurer upon warrants issued by the County Clerk upon certified accounts of the Road Superintendent of such Road District and approved by the Commissioners Court of the County." (Art. 632.)

The statute no where limits the authority and discretion of the County Commissioners Court as to the expenditure of the proceeds. The County Commissioner in whose Commissioner's Precinct the political subdivision or defined district is located, is *ex officio* Road Superintendent of the Road District with power to contract for and on behalf of the Road District, provided such contract shall not exceed $50., and

> "all contracts exceeding the sum of $50., shall be awarded by the entire Court, which contract shall be binding on said County, political subdivision or defined district." (Art. 639.)

The proceeds of the bonds do not constitute a trust fund for road construction only. A creditor recovering damages for breach of contract may compel payment of his damages therefrom. See *Horn* v. *Matagorda Co.*, (Tex.), 213 S. W. Rep. 934, (Commission of Appeal sitting as a branch of the Supreme Court). In that case, it was said:

> "It may be true that to hold the fund derived from a sale of bonds subject to recoveries for breach of contract might in some instances result in a dissipation of the fund without accomplishing the purposes for which it was raised. Such dissipation might also result from unwise or improvident expenditure of the fund. But these possible results are *risks assumed by the taxpayers* when they accept the benefits of the statute by voting the tax. Their remedy in a proper case is against the officers the law designates to act for the district. The possibility of such results is no answer to the legal claims of those who have contracted upon the faith of the statute with the officers clearly authorized to bind the district and its funds."

In 1925, Art. 637, of the Texas Revised Civil Statutes, 1911, was amended so as to authorize the levy of taxes by the District to pay any judgments rendered against it (Gen. Acts, 1925, Ch. 132, p. 334). The tax so authorized is of the same nature as the tax to pay the bonds; no distinction is made; yet it must have been a general tax independently of benefit, for it is for the purpose of satisfying a corporate liability.

In *Road District No. 4* v. *Home Bank & Trust Co.*, 5 Fed. (2d) 625, it was held that the District is liable for the amount of bonds, although they were unlawfully sold and the original purchaser not only dishonestly acquired possession of the bonds, but appropriated the proceeds.

In other words, this decision necessarily held that the bonds represented a debt of a corporate entity, and that the tax *ad valorem* on all the taxable property was not levied as a trust fund to construct roads, but as a fund for the payment of a debt.

(*E*). *The Character of the Tax.*

The statute requires that a tax sufficient to pay the interest and to produce a sinking fund for the bonds shall be levied "before said bonds shall be put on the market" (Art. 634). The tax, if for a political subdivision or other defined district, is to be assessed and collected

> "as is now provided by law for the assessment and collection of common school district special local taxes".

In other words, the common school district taxes which are voted by the qualified property taxpaying

voters pursuant to authority conferred by section 3, Art. 7 of the Constitution and which are levied upon the real and personal property in the School District in the same manner as other State and county taxes, for the purpose of raising funds for the ordinary maintenance and operation, as well as for the building of school houses.

In the nature of things, this tax involves an annual extension on the tax rolls according to the value as it may fluctuate from year to year.

In the case of *Road District No. 2 of Archer County,* the bonds have been ordered to be issued as serial bonds extending over thirty years, the maximum term mentioned in the submission, involving thirty payments of the principal. In other words, an instalment of the principal ranging from $5,000 per year in the earlier years to $18,000 in the last years of the thirty year term, will be paid in each year. In each year, to comply with the statute, a levy must be made for the annual interest and for the next instalment of the principal, that is to say, in the first year, on bonds bearing interest at five and one-half per centum per annum, the maximum permitted under the statute, the interest will be $17,500. The first instalment of the principal will be $5,000, making a total levy of $22,500. The next year's interest will be reduced $275. and the interest in each successive year will be reduced correspondingly, until the whole debt would be paid. The result will be, that in the last half of the term of thirty years over which the bonds run, not only will the amount of principal be very materially reduced, but the annual payments of the interest will be cut in two.

(*F*). *Successive Elections for Future Improvements.*

We have pointed out above, that from year to year as the bonds mature, the amount levied in each year would be reduced. The principal debt would also be reduced, making available an increased margin of indebtedness, so far as this issue is concerned, as the years go by. In addition, presumably the taxable value of the real property in the District would increase, thereby further increasing the margin within which debt for road purposes may be created.

The power conferred upon the District by the statute to lend its credit and issue bonds permits it to hold successive elections to vote bonds for road purposes, so long as the necessary petitioners can be found; and bonds may be voted and issued until the constitutional limitation of twenty-five per cent of the assessed value of the real property has been reached for all the purposes mentioned in section 52 of Article 3.

Plaintiffs and their friends may sign a petition complying with the statute calling for a further issue of bonds by District No. 2, and the proceeds may then, in the discretion of the County Commissioners Court, be used to improve the highway through or immediately adjacent to the lands of the plaintiffs. This process may be continued until every foot of existing highway has been improved. It may also be continued for the construction of new highways, until all the road in the district have been put in the most perfect condition, and every person has been given a road of the most improved nature immediately adjacent to his property. The only limitation is, that the bonds of the

successive issues shall not exceed the limitation prescribed by the Constitution.

Under these circumstances, we respectfully submit that the district was not carved out to furnish credit and to pay for providing improvements on designated roads wholly within the territory selected. We submit that purpose was not special. We submit that the District will not cease to exist as a body corporate upon the payment of the bonded debt involved in the proceedings. We also submit that the inclusion of the plaintiff's lands in the road district, does not make it impossible, until the last bonds mature thirty years hence, to raise money for the improvement of roads needed to serve the territory in which plaintiff's lands are situated. It is not necessary to create another district for that purpose. This district can raise the money under the Constitution and statutes of Texas for the construction and improvement of every kind of highway that its taxpaying property owners may care to issue bonds for.

There is no statute of Texas which terminates the existence of the District as a "defined" territory under the Constitution and Statutes, and we are unable to discover any basis in either for the view that on the payment of the debt the District will cease to exist as a body corporate, or that the organization of the District will prevent other and additional improvements.

Sometimes, as in the present case, an order is adopted by the County Commissioners Court specifying the roads to be improved with the proceeds of the particular issue, before the election is held. This is done as an electioneering step, to advise the property taxpayers how their money is to be expended. Good faith will compel the County Com-

missioners Court to carry out the pre-election promises which it has made, but these promises were not made because of anything in the statute, but only because sometimes the property owners before voting the money *demand* to know how it will be expended.

In the present case, neither the petition, nor the order defining the District, nor the order of election, nor the notice of election, designated any particular roads. The order specifying the roads made in the present case does not recite any petition therefor, but merely that the petitioners and the public generally desired the roads named.

In the present case, the transcript record discloses the reason for the formation of the District. The northerly and the southerly halves of Archer County were split wide apart in their demand for highways. Each wanted all the improved highways to be within its own limits. In the practical application of the Texas Constitution and the Road District Act, a means is presented by which half can improve the highways, that is, provided each half will lend its credit to the borrowing of money by a vote of two-thirds of the resident property taxpaying voters.

The means which is offered is simply a means by which, in keeping with the American genius, the inhabitants of the territory may progress and furnish the public by voluntary taxation, with the conveniences and comforts of modern civilization, although their neighbors across the fence may refuse to see that an improved concrete highway is a general public advantage, as against a dirt track in which, in times of rain, wheels will sink to the hub.

II.

The Legislature of the State of Texas has conferred upon the road districts general powers of taxation to provide for the payment of bonded debt incurred for general road construction purposes.

The opinion of the Court in the present case says that

> "The proceedings in this case cannot be sustained as the levy of a general tax."

This statement is contrary to the view which has heretofore been generally accepted in Texas and we respectfully submit cannot be sustained in view of the terms and purposes of the statute.

It is significant that the Constitutional amendment of 1904 was by way of addendum to that provision of the Texas Constitution which prohibited the Legislature from authorizing any county, city, town or other political subdivision of the State to lend its credit or to grant public aid, or thing of value, in aid of or to any individual, association or corporation. In other words, the Article as originally framed, dealt with the financial affairs of the municipalities and subdivisions. As originally framed, it was a prohibition against the incurring of debt. The amendment of 1904 added a rider or qualification to this prohibition stating terms and conditions under which counties, political subdivisions and defined districts might lend their credit and borrow money for certain public purposes. In other words, the primary purpose was

to enlarge the powers of these bodies to raise money. The money so to be raised was to be raised in the financial markets, and it was to be raised by the issuance of securities which were to be supported by

> "such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the Legislature may authorize."

Upon other questions, the Supreme Court of the United States has held that the character of the security to be issued, viz: a security to be sold in the financial markets must be taken into consideration in construing the powers conferred.

In *United States* v. *Clark County*, 96 U. S. 211, where the Court held that a special tax of one twentieth of one per cent was not the limit of taxation for the bonds involved, but that they were the general obligation of the County and payable from a sufficient tax, it supported this determination by the declaration that

> "We cannot think the Legislature proposed rendering the bonds unsaleable or almost worthless in the hands of those who might be so unfortunate as to hold them. Such an intention would have defeated the objects sought to be secured by giving authority for their issue."

In *Gunnison County Commissioners* v. *Rollins*, 173 U. S. 255, this Court sustained recitals that the total amount of the issue did not exceed the limit prescribed by the Constitution of the State. Mr. Justice HARLAN, at page 275, said, that it was insisted that the Court's decision rendered it impossible for a State by constitutional provision to guard against excessive municipal indebtedness.

He said that that result by no means followed; that the State Constitution might prescribe a definite rule or test for determining whether that limit had already been exceeded, and in that event all who purchased bonds would be subject to that rule or test whatever might be the hardship upon *bona fide* purchasers. He also pointed out that it was competent for a State to declare that its securities should at all times be subject to contest. Then he added:

> "But for reasons that every one understands, no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Similarly, in *Denver* v. *Home Savings Bank*, 236 U. S. 101, a case which involved the negotiable character of certificates of indebtedness, Mr. Justice HOLMES, at pages 104 and 105, pointed out

> "The power to issue certificates of indebtedness or bonds is given in terms, and it is contemplated that these instruments may be sold to raise money for the purpose named."

So, in the present case, when the Constitution and statute authorize counties, political subdivisions and defined districts

> "to issue bonds or otherwise lend their credit and levy and collect such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof"

both the statute and the Constitution contemplated a negotiable security to be sold in the financial markets supported by a general *ad valorem* tax on the taxable property in the District, for such a

tax is the usual security behind negotiable municipal bonds.

The constitutional amendment of 1904 was passed to enable defined districts, as well as political subdivisions and counties, to raise money for highway purposes, among others. The power to construct the highways previously existed, but as pointed out above, the counties were hampered by the inadequacy of the tax, and it was necessary to confer additional powers to lend their credit and borrow money. This was authorized by the amendment to section 52, of Article 3.

Hence, the questions involved in this case should not be approached from the narrow perspective that what the statute authorized and the constitutional amendment contemplated, was simply a specific local improvement. The intent of the Constitution and of the statute, was to furnish a means by which the property taxpaying voters of the County, political subdivisions and districts might voluntarily lend their credit, borrow money and vote the taxes. By Section 3 of Article 6 of the Texas Constitution, and by the general practice adopted in Texas (Chapter 2, Title 18, Revised Statutes 1911), the property taxpaying voters alone vote on the question of creating debt.

The purpose of the amendment is persuasive as to the nature of the tax which was contemplated by the Constitution. It was the same kind of tax that was authorized for other securities. Accordingly, section 633, Texas Revised Statutes 1911, declared that the general laws of Texas relative to county bonds, not in conflict with the particular provisions of the Act of 1909, shall apply to the issuance, approval, registration, sale and payment of county and highway district bonds, provided for

by the Act of 1909, placing these bonds on the same basis as to issuance and payment as regular county obligations.

The Texas Constitution defines and limits the power of general taxation. Article 8, section 1, requires

> "all taxation shall be equal and uniform. All property in this State * * * shall be taxed in proportion to its value which shall be ascertained as may be provided by law."

Section 9 of Article 8 of the Constitution regulates the rate of State and municipal taxation

> "except as in this Constitution otherwise provided."

Section 5 of Article 11, as amended, authorizes cities of 5,000 inhabitants to collect such taxes as may be authorized by law or their charter, not exceeding two and one-half per cent, and prohibits the creation of debt by such cities, unless provision be made to assess and collect annually a sufficient sum to pay the interest and create a sinking fund.

Section 4 of Article 11, as amended in 1920, regulates the *taxes* which may be collected by cities and towns having a population of 5,000 or less.

Section 6 of Article 11, authorizes counties, cities and towns to assess and collect the *taxes* necessary to pay the interest and principal of the debt existing at the time of the adoption of the Constitution.

Section 7 of Article 11, prohibits the creation of any debt by any city or county, unless provision is made at the time for levying and collecting *"a sufficient tax"* for the principal and interest.

Section 7 of Article 11, also authorizes the counties and cities on the Gulf Coast to construct sea

walls and to levy and collect such *tax* for sea walls, breakwaters and sanitary purposes, as may be authorized by law, and the creation of debt for such works.

The same word "tax" or "taxes" is used in all these provisions. The tax which is authorized in the case of counties, political subdivisions and defined districts by the provisions of section 52 of Article 3, as amended, does not differ in nature and kind from the taxes referred to in the other provisions of the Constitution. Under section 52 of Article 3, as amended, the tax is levied for the same purposes as in many of the other provisions, viz.: it is a tax to pay the debts of defined district; and so far as the Constitution of Texas is concerned, it stands on the same basis as taxes for that purpose referred to in the various provisions of the Constitution in relation to making provision for the payment of the debts and obligations of counties, cities and towns. When the Legislature proposed, and the people of the State of Texas voted, the amendment to the Constitution in 1904, is it not to be presumed that they intended to authorize and did authorize the same kind of tax as they had previously authorized for the debts and obligations of counties, cities and towns?

Section 52 of Article 3 of the Constitution, as amended, and the statute authorizing the issuance of bonds by road districts, has many times been before the Supreme Court of Texas. The Supreme Court has uniformly treated and held the provisions of the Road District Act to be valid and binding. There has never been a suggestion by it that it is open to any attack whatever.

The Supreme Court of Texas has sustained the constitutionality of the statute in *Simmons* v.

Lightfoot, 105 Tex. 212, 146 S. W. 871. Road District No. 4 of Liberty County had been organized and the Supreme Court of Texas issued a writ of mandamus to compel the Attorney General to approve its road bonds.

In *Munson* v. *Looney,* 107 Tex. 263, it was contended that taxes levied in payment of road district bonds, were ordinary taxes subject to the restrictions of the Constitution as to equality. The following propositions were submitted by respondent:

> 1. "The requirements of equality and uniformity of taxation control the tax that must be levied to take care of the interest and sinking fund of the bonds * * *." (Id. p. 265)
>
> 2. "It has been expressly held by our courts that the taxes levied by drainage districts to take care of the interest and sinking fund on bonds issued under the provisions of section 52 of Article 3 of the Constitution and the drainage statute enacted thereunder, are not in any sense 'special assessments' but are ordinary taxation, to which the restrictions of the Constitution as to equality, etc., apply. * * *" (Id.)
>
> 3: "In order for taxes to be 'equal and uniform' as required by the Constitution, two things are absolutely necessary—(1) Tax on two similar kinds of property must be equal and uniform. (2) The assessment and taxation must be equal and uniform throughout the taxing district. * * *" (Id.)

The court did not expressly rule on the question of the tax being a "special assessment," but saw proper

> "to strip this case of all of its complications and misleading propositions, so as to make clear and unquestionable the proper course to be pursued in issuing such bonds," (Id. p. 266)

and held in substance that the tax for an issue of road district bonds must be uniform throughout the district, and on that basis that the bonds in question could not be issued in view of the limitations imposed by section 52, of Article 3.

This view of the court was properly taken by reason of the fact that it had refused writs of error in *Harris County Drainage Dist.* v. *Parker,* 148 S. W. 351, and *Wharton Co. Drainage Dist.* v. *Higbee,* 149 S. W. 385, and which cases held that drainage taxes under section 52, Article 3, are not "special assessments." In the concurring opinion in *Munson* v. *Looney, supra,* it was expressly declared by HAWKINS, J. that the provisions of section 1 of Article 8 of the Constitution, which declare that "taxation shall be equal and uniform," apply

> "to each and every district within the purview of said section 52, including drainage districts and road districts"

(*Munson* v. *Looney, supra,* pp. 270, 271). It will thus be seen that for more than ten years, the Supreme Court of Texas has held taxes in defined road districts are "taxes" as that term is generally used and understood.

In *Robbins* v. *Limestone County* (Tex.), 268 S. W. Rep. 915, (1925), the case related to the power of the Legislature to bring county and road district roads under the control of the State Highway Department. The Supreme Court quoted the provisions of section 52 of Article 3 of the Constitution as amended, recognized the power of the County and the District to improve the roads in the County and District, declared that the moneys received for that purpose might

> "not be diverted to other purposes than those for which they were voted"

that is, for the improvement of the roads in the County or in the District, but otherwise treated both sections 52 of Article 3 of the Constitution, and the statute authorizing road district bonds, as a valid and integral part of the State Highway administration.

In *Horn* v. *Matagorda County* (Tex.), 213 S. W. 934, the Commission of Appeals of the Supreme Court held that road district funds may be applied in payment of damages for breach of contract. The judgment appealed from directed that a proper warrant be issued and delivered to the plaintiff to be paid out of the proceeds arising from the sale of road bonds issued and sold by the road district.

In *American Surety Co.* v. *Hill County,* (Tex.), 267 S. W. 265, the Commission of Appeals of Texas sustained a judgment against the person to whom the district road bonds were delivered and his surety for damages for the conversion of the bonds.

Bell County v. *Hines, Director General,* 219 S. W. 556, (Writ of Error refused by Supreme Court), did not involve a navigation district as indicated in appellants brief, but did involve only one question, namely: Whether or not the tax levied by the Commissioners Court of Bell County, for the purpose of paying the principal and interest of county road bonds *issued under this statute,* was a county tax or a road improvement district tax. It was contended by the Director General that the tax was the tax of a road district having the same boundaries as Bell County and not of the County as such, and therefore the intangible assets and rolling stock of the railroad company were not liable therefor. The Court held that counties had the right to levy taxes within the limits prescribed

by the Constitution, for county purposes, prior to the 1904 amendment to Section 52, Article 3 of the Constitution; that the construction and maintenance of public roads within a county is a county purpose; that by reason of the amendment to section 52, Article 3, *the limitation as to the amount of taxes that could be levied for road purposes was removed as to counties;* and that the taxes levied in payment of the road bonds, being a county tax, had the same dignity as other county taxes, and therefore, the properties of the railroad were liable.

The opinion of this Court in the present case says that

> "The proceedings in this case cannot be sustained as the levy of a general tax. The Commissioners' Court is authorized to levy general taxes for road purposes up to a stated maximum on each $100 valuation. Article 2242; Constitution, Art. VIII, sec. 9. The expenditure of the moneys so raised is not limited to any specified roads."

This suggests that the Court is of the opinion that the only general tax which County Commissioners' Courts may levy, is that authorized by Article 8, section 9, of the Constitution, being a tax of fifteen cents on the $100 for roads and bridges, and an additional *ad valorem* tax of fifteen cents on the $100 for public roads when voted by a majority of the electors. This is not the view of the Texas Courts. As pointed out above, by PHILLIPS, C. J., in *Aransas County* v. *Coleman-Fulton Pasture Co., supra,* the reason for the adoption of the amendment to section 52 of Article 3 of 1904 was the necessity of enlarging the credit of Counties and districts by superseding the tax

limits of Article 8, section 9. The Courts of Texas have repeatedly held that the 1904 amendment to section 52 of Article 3, conferred upon counties the right to vote road bonds and levy taxes therefor in addition to the taxing power authorized by section 9 of Article 8.

See, *Bell County* v. *Hines,* 219 S. W. 556, *supra.*

In *Fleming-Stitzer Road Building Co.* v. *Chastain,* 241 S. W. 619, the Court said:

> "By a well-recognized canon of construction if two provisions of the Constitution or two articles of the statutes can reasonably be so construed as to leave both of them effective, such construction should be adopted. It appears plain to us that article 8, section 9, of the Constitution, and the acts of the Legislature under title 18, c. 1, Revised Statutes, are limited to bond elections required to be carried by only a majority vote of the qualified taxpaying voters; while article 3, sec. 52, of the Constitution, and title 18, c. 2, of the statutes, has reference to bond elections required to be carried by a two-thirds vote. This construction permits both articles and the statutes thereunder to stand without conflict."

If the decisions of Texas be carefully scanned, we do not believe that a single remark can be found which countenances the belief that under the provisions of section 52 of Article 3 of the Constitution, as amended, and the legislation to carry it into effect, the special and peculiar benefit to the property immediately adjoining the highway can legitimately be considered in the expenditure of moneys raised by this means.

It must always be clearly kept in view that the debt is created to raise money to construct or improve rural highways forming a part of the general highway system of the State. The tax for this purpose has not usually been levied on the basis of benefit. Benefit assessments for this purpose are the exception, and not the rule. In this respect they differ materially from taxes for irrigation or drainage or other enterprises which involve the direct improvement of real estate in private ownership. In the case of irrigation districts, water is brought to lands in private ownership. In the case of drainage, water is taken from lands in private ownership. The principal benefit attaches to the land. The public benefit is only incidental and flows from the operation of the works on lands in private ownership. It is merely because the public safety, health or welfare is promoted by the improvement of lands in private ownership, that a public purpose attaches to irrigation or drainage enterprises.

So too, in the case of streets in cities. The benefit to the abutting property is immediate and probably constitutes the major benefit. Streets must be opened before sewers, water mains and gas mains can be laid. Sewers, water and gas mains are primarily for the benefit of abutting property. The opening of the street renders it possible to improve the abutting property by the erection of buildings. Here again, a special assessment is the frequent, if not the usual method of raising the cost.

But an entirely different situation exists in the case of rural highways. The abutting property owner usually gains no advantage, except an improved facility of travel. It is merely because he can reach the highway quicker than those who are

not on it that the greater benefit accrues to him. This is simply the same kind of benefit, though differing in degree, which accrues to all who may have occasion to use the highway. Hence, in this country, rural highways have usually been constructed by an *ad valorem* tax and the levy has been laid irrespective of benefits.

It is not to be wondered, therefore, that in dealing with the tax which is levied by road districts for the purpose of paying debts created to improve the State highways, the Texas Courts have regarded these taxes as levied entirely irrespective of benefits.

The cases cited by the plaintiffs and appellants in this action in their brief on the appeal, are not properly applicable, and do not constitute any authority as to the construction to be placed upon the statute authorizing the issuance of road district bonds. The first case cited is *Dallas County Levee Dist.* v. *Looney,* 109 Tex. 326, 207 S. W. 310. This was a case of a Levee District which had taken advantage of what is known as "The Canales Act",—a statute passed to carry into effect the so-called Conservation Amendment to the Constitution of Texas (Art. 16, Sec. 59). That constitutional amendment provides for taxes "equitably distributed" and it was this language which was construed to mean and possibly to require a distribution upon the basis of benefit. It is apparent that this is very different language from that used in Section 52 of Article 3 of the Constitution as amended, and in the statute before the Court in the present case, where the only word used is "taxes."

The second case cited, is *Texas & P. R. Co.* v. *Ward County Irrigation Dist.,* 112 Tex. 593, 251 S. W. 212. That case involved an irrigation dis-

trict. Elsewhere in this brief we point out that in the case of irrigation districts, the benefit is conferred directly upon the lands irrigated, and the public benefit is only incident to the improvement of these lands. In other words, in the case of irrigation projects, a special assessment for benefits would seem to be the natural and appropriate method of raising the money. The irrigation district was organized under the Irrigation Act of 1913 (General Laws, 1913, Ch. 172, p. 380). That statute requires a petition setting forth the necessity, public utility and feasibility, the proposed boundaries, and designating a name. A hearing is had upon the petition, and if at the hearing (Sec. 3), it appears to the satisfaction of the Court that the organization of the District, the construction or purchase of the plant specified in the petition, is feasible, that it would be a public benefit

> "and a benefit to the lands included in the district",

then the Court should so find.

Plaintiffs and appellants herein have quoted from the opinion in this case. But the quotations do not, we respectfully submit, present a fair view of the opinion. For example, the Court said:

> "It will be observed that the amendment of 1904 (to sec. 52 of Article 3 of the Constitution) confers upon the Legislature ample authority to create taxing districts for the purpose of promoting irrigation, and the enabling statutes have provided a system for the establishment, government, and support of such districts, under which, when formed, they are taxing districts to all intents and purposes, not essentially different from counties, cities,

> or other municipal corporations within the general powers and purposes for which they are created."

This declaration implies that the Court was of the opinion that the Districts might be authorized to levy taxes for governmental purposes, and not merely because of benefit. It is, however, to be noted that in other parts of the opinion the Court discussed the terms of the statute, recognized the fact that the statute was based upon benefits, although according to the opinion of the Court it need not have been so based, and the Court limited the language which it used to the terms of the statute then before it, saying:

> "Treating the law, therefore, as creating a tax for local improvements, to which must be applied the doctrine of special benefit to the property taxed"

etc., etc.

The decision thus amouts to no more than a simple holding that inasmuch as the statute required the benefits to be taken into consideration, every requirement of the law was satisfied.

Our reading of this case is that it indicates that the Supreme Court of Texas was of the opinion that whether the tax should be a general tax without regard to benefits, or a tax based upon benefits, was a matter for the Legislature to determine, and having determined that it should be a tax based upon benefits, the statute was valid.

This is a very different situation from the present case, where the Legislature has simply authorized a "tax" for the purpose of paying the debts and obligations of a public or quasi-municipal corporation, which debts were incurred for a purpose which is usually treated as governmental and not as a matter of special and peculiar benefit to the property owners.

III.

Road district taxes levied *ad valorem* on all the real and personal property in the district, according to the assessment for State and County purposes, have uniformly been held by the Courts of last resort in States other than Texas, to be general taxes.

The rule which obtains in Texas, is not unique. It is the same rule that is followed in other States. We believe we do not misstate the effect of the decisions when we say that we know of no case in the Court of last resort of any State, which holds that a road district tax, levied *ad valorem*, on all the taxable property, real and personal, within the district according to the assessment for State and county purposes, is a special assessment, and is not a general tax. On the contrary, they uniformly hold that such a tax is a general tax of the same character and nature as a State and county or general city tax, i. e., it is a tax not levied because of special and local benefits, but because the construction and maintenance of highways is a governmental function and duty, and the tax is levied in the performance of governmental power.

We submit that the following elements distinguish the impost in the present case from a special assessment and clearly show that it is a general tax:

(a) It is not for "specified improvements". On the contrary, it is to pay the debts of a public or quasi-municipal corporation.

(b) The statute does not require that the roads to be improved be designated before the bonds and tax are voted. On the contrary, as we have shown, this is merely done, if done at all, for the information of the voters, and the designation whether before or after the election, is within the discretion of the County Commissioners Court.

(c) The same public or quasi-municipal corporation may vote additional bonds and taxes. The liability for the additional bonds so voted is exactly the same as for the first. The taxes for the subsequent issues rank *pari passu* with the tax for the first issue.

(d) The Commissioners Court is not obliged to accept a district described in the petition, if it does not conform to the law or to the decisions of this Court.

(e) The levy that is made is not *once for all,* but is a succession of annual levies to pay the principal and interest of a debt.

(f) The improvements in the present case are two State highways and two County highways. They are not local improvements in any sense. The district is aiding in the immediate construction of needed means of travel for the benefit of the community as such, and not to improve any particular property.

These elements distinguish the tax in the present case from a special assessment. The text books use language which clearly shows that the views we urge are correct.

> "The differences between a special assessment and a tax are that (1) a special assessment can be levied only on land; (2) a special as-

sessment cannot (at least in most states) be made a personal liability of the person assessed; (3) a special assessment is based wholly on benefits; and (4) a special assessment is exceptional both as to time and locality. The imposition of a charge on all property, real and personal, in a prescribed area, is a tax and not an assessment, although the purpose is to make a local improvement on a street or highway. A charge imposed only on property owners benefited is a special assessment rather than a tax notwithstanding the statute calls it a tax."

Cooley on Taxation (4th Ed.), Vol. 1, sec. 31, page 106.

Applying the first distinction of Judge Cooley, the tax in the present case is not levied solely upon land. On the contrary, the statute provides that it shall be assessed and collected in the same manner as other road taxes if for a county, and if for a political subdivision or other defined district, in the same manner as is provided for the assessment and collection of common school district taxes. Both of these taxes are on personal property as well as on real property.

Applying the second of Judge Cooley's distinctions the personal liability imposed is precisely the same as the personal liability in the case of general taxes, i.e., in the case of the general county road tax and in the case of the common school district tax.

Judge Cooley's third distinction that a special assessment is based wholly on benefits, necessarily implies that some machinery must be provided for a determination of the benefits when an act purports to authorize the levy of a special assessment.

If the power to determine the benefits to such lands is delegated to an agency of the State or Legislature, such agency acts in a judicial capacity, making a judicial determination of the benefits. This necessarily involves a notice and a hearing. A body levying a general tax does *not* act in a judicial capacity, but as a representative of the sovereign State. No question of benefit from the tax is involved. There is no element in the levy of such a tax which requires any finding of fact or a judicial determination of any character whatsoever, so long as the property owner has a hearing as to the assessed value for taxation generally. He has that in the assessment for State and County purposes.

Applying this third distinction, we find the Legislature has used apt language to provide for the levy of a general tax. The tax may be voted before the improvements are fixed. How can the benefit be determined?

The fourth distinction suggested by Judge Cooley imports that a special assessment is levied for a particular improvement. We have, however, pointed out, that it is no part of the petition, nor necessarily of the order calling the election, that the roads should be designated therein. The designation of the roads is left to the discretion of the Commissioners Court. It can be done at any time the Court deems proper. It need not be done until after the bonds and tax have been voted.

A fifth distinction may be added, i.e., that special assessments are not subject to constitutional provisions requiring uniformity of taxation. The Texas decisions hold or clearly imply that all road district taxes are subject to the constitutional requirement of uniformity.

In Essays in Taxation, (9th Ed.), p. 415, to 417, Professor Seligman discusses the difference between special assessments and taxes. He says:

> "Special assessments, like fees, are not, however, taxes in the ordinary or narrower sense. Taxes, as we know, are compulsory contributions levied to defray the expenses incurred in the common interest, without any reference to particular advantages accruing to the taxpayer; but in special assessments, as in fees, the services for which the expenses are incurred redound to the particular benefit of the individual. The primary test of a tax is that it imposes a common burden; the primary test of a special assessment is that it implies a special benefit. From this one great distinction flow all the others, which may be summed up as follows:
>
> First. In a special assessment the special benefit to the individual is measurable. In a tax the special benefit does not exist, or, if it exists at all, results incidentally from the individual's share in the common benefit; it is not separately measurable.
>
> * * * * * * *
>
> Secondly. Taxes may be proportional to property, or to income, or to expense, or to any other test of faculty, or they may be progressive rather than proportional; special assessments can never be progressive, but must always be proportional to benefits.
>
> * * * * * * *
>
> Thirdly. Special assessments are confined to specific local improvements, while the sphere within which taxes operate is in this respect unlimited.
>
> Fourthly. For a special assessment the government performs a definite, particular act in return; it is an instance of service and counterservice, of give and take. For a tax the gov-

ernment does not pledge itself to do a particular thing for the particular individual in return. The reasoning here is precisely the same as that adduced above in discussing the distinction between taxes and fees. A special assessment is here on exactly the same footing as a fee.

Fifthly. Taxation is resorted to in order to defray the running expenses of government, and *to effect in time the amortization of the debt;* while the object of special assessments is in the main to provide for the capital account—to increase, as it were, the permanent plant of the community."

Professor Seligman also discusses the distinction between a special assessment and a special tax. He says, pp. 415, 416:

"No one, perhaps, will be apt to confound a special assessment with a general tax; but there is also a clear line of distinction between a special assessment and a special tax. An adequate discussion of the relation between a general tax and a special tax belongs to the question of the subclassification of taxes in particular, and would lead us too far astray here. But we can say at all events this: a general tax, like the ordinary state or local tax in America, is not levied for any definite, particular expenditure, but is assessed for general governmental purposes; a special tax, like the English local rates or the local taxes in some American states, like New Jersey, is assessed for the accomplishment of some special task to which the government is pledged, and is levied on a definite section of the population. The police rate, the sewer rate, the poor rate, the lighting rate, are each levied for the special purpose and on the definite class of taxables subject to the rate. But this special tax is none the less a veritable tax; it is levied for a

> public purpose, it is assessed on what is deemed to be the faculty or 'means' of the taxpayer; and there are no particular benefits accruing to him as an individual. Even if he does perchance derive a benefit, it is not a special, measurable, individual benefit apart from the common benefit that the other members of the class derive; it is simply an incidental result of his share in the common benefit. * * * In other words, the test of the special assessment is measurable special benefit; the test of the special tax is special taxable capacity or faculty, just as the test of the general tax is general taxable capacity or faculty. The distinction is quite clear; yet the few writers who have spoken of special taxes at all have almost universally confused them with special assessments."

It must always be kept in view that all taxes presume a benefit to the taxpayer, but in the case of taxes strictly as such, the benefit is one which is common to the community. In the case of special assessments, the benefit is one which is special and peculiar to the property taxed. In *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, where it was held that cars of a refrigerating company permanently employed outside the State of the company's domicile, are not taxable by that State as personal property within its jurisdiction, Mr. Justice BROWN said:

> "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the *creation and maintenance of public conveniences in which he shares*, such, for instance, as *roads*, bridges, sidewalks, pavements, and schools for the edu-

cation of his children. * * * But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owner of property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or *of a road tax, though he never use the road.* In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. * * * Subject to these individual exceptions, the rule is that in classifying property for taxation some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference. It is often said protection and payment of taxes are correlative obligations."

In *People* v. *Whyler,* 41 Cal. 351, RHODES, C. J., said at pages 354, 355:

"The principal reason urged in support of the position that the charge is an assessment, is that it is levied for the purpose of making a local improvement. Acts almost innumerable have been passed, levying taxes for such purposes, and no cases are called to our attention which hold, that by reason of the purpose for which they were levied, they became assessments. Taxes for the construction of roads, bridges, and school houses are familiar instances. The funds to pay for the grading of a street, may be raised by taxes levied upon all the property of a town, should the law so direct; but the tax does not become an assessment, because the latter is the mode usually adopted to raise the funds for that purpose.

There is no sufficient reason for holding that the charge is not, what the Legislature declared it to be— a tax.

* * * * * * *

"It is further alleged, that the tax was levied to pay for a local improvement, and was not assessed upon property in proportion to the benefits derived from the work. If the Legislature intended that a tax should be levied, and if it may be levied, to pay for a local improvement, it is not only no objection to the Act, or the proceedings that were had under it, that it is not levied upon property in proportion to the benefits received by means of the improvements; but if a tax should be levied on that principle, it would be fatally defective, because lacking the constitutional qualities of equality and uniformity. A tax is equal and uniform, which reaches and bears with the like burden upon all the property within the given district, county, etc. It bears the like burden, when the valuation of each parcel is ascertained in the same mode—the mode prescribed by law—and when it is subject to the same rate of taxation as other property within the district, county, etc. Absolute equality is unattainable, and the benefits derived, or to be derived, from the expenditure of the tax, cannot be taken into the account."

We respectfully call the attention of the Court to *In re Bonds of Orosi Public Utility Dist.,* (Cal.), 235 Pac. Rep. 1004. In that case, the statute as originally enacted, and as it stood when respondent district was formed, did not provide for any notice or hearing on the petition for the formation of the district. The Court conceded that if it were formed for the purpose of assessing upon the lands within its boundaries benefits to be derived by the lands from some public improvement, the statute

was unconstitutional. The Court, however, held that the statute created a public corporation, the inhabitants and property owners of which are subject to taxation for municipal purposes and may properly be so subjected without any hearing as to the benefits to be derived from the creation and conduct of such corporation. The particular works involved in the District were the construction of water works in rural territory. The court said (p. 1010):

> "It is quite apparent to us that the Legislature had in view such association of the people living in the outlying districts, when it enacted the statute providing for the formation of public utility districts in the unincorporated territory of the state. It thereby provided for the creation of public agencies or quasi municipal corporations, the declared purpose of the act being to extend to the inhabitants of such districts, when properly organized, advantages in the use and benefit of certain utilities which they might not be able to obtain in any other way, and which, from common experience, we know tend to promote the general welfare of the people of the state. That it had the power to do so cannot be denied."
>
> "We take it to be now a generally accepted proposition that, while a municipality, which undertakes to supply those of its inhabitants who will pay therefor with utilities and facilities of urban life, is performing a function not governmental, but more often committed to private corporations or persons with whom it may come into competition, it is, in fact, engaging in business upon municipal capital, and for municipal purposes. 28 Cyc. 125. Any tax, therefore, levied and collected for the purpose of supplying such municipal capital is not a tax or assessment on property

directly benefited by the construction of some local improvement, but is a general tax levied just as, and for the same purpose that, any general municipal tax is imposed for carrying on the governmental functions and utilitarian objects of duly incorporated cities or towns."

In *Shoshone Highway Dist.* v. *Anderson,* 22 Idaho 109, 125 Pac. 219, the question related to the character of certain highway districts organized in much the same manner as in the present case. The Court sustained the constitutionality of the statute, and the validity of the proceedings, and said, (p. 223):

"The Legislature in this instance has seen fit to provide only for the creation of highway districts for the purpose of improving the highways of a section created into a district. It has determined this matter and what property is subject to taxation therein, and the method of apportioning the fund raised, and it was acting clearly within its constitutional right, and there is no attempt on the part of the Legislature to impose taxes for the purpose of any county, city, town, or other municipal corporation, but a clear exercise of legislative authority granting to a community subject to certain restrictions the right to organize themselves into a municipal corporation with power of local taxation, and the issuing of bonds for public improvements, and the section of the Constitution above referred to in no way prohibits such legislative action. A highway district, as created in this act, is not a municipality such as a county, city, town, or village, but is an entirely different kind of municipality created for a specific purpose. Fenton v. Board of County Commissioners, 20 Idaho, 392, 119 Pac. 41; Boise Irr. etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25, 321; Hettinger v. Good Road Dist. No. 1, 19 Idaho, 313, 113 Pac. 721."

In *Hopkins* v. *Special Road and Bridge Dist. No. 4,* 73 Fla. 247, 74 So. 310, the court had before it an act to create special road and bridge districts. The taxes were directed to be assessed, equalized and collected upon the taxable property in the district by the same officers and in the same manner as is provided by law for the assessment, equalization and collection of other county taxes. The court referred to this provision and other provisions of the statute, and said:

> "These and other provisions clearly indicate a legislative intent to provide for the establishment of permanent territorial subdivisions of counties and to make the 'construction, repair and maintenance' of 'permanent roads and bridges' in such subdivisions, a governmental purpose and function. This being so, the taxes levied under the acts are for a governmental purpose within the power of the Legislature, and no question of special assessments for local benefits is presented. In this view the acts are an exercise of the taxing power in a manner and for a purpose not forbidden by the Constitution, and the limitations as to notice and benefits that may be incident to local assessments for special benefits to property are not applicable."

The Court further cited its decision in *Stewart* v. *De Land-Lake Helen Special Road and Bridge Dist.,* 71 Fla. 158, 71 So. 42, where it held that the distribution of the tax on all the taxable property in the District complied with the requirements of the Constitution that the Legislature should provide for a uniform and equal rate of taxation, that provision having reference merely to the property subject to taxation.

This case is cited in the subsequent case of *Charlotte Harbor & N. R. Co.* v. *Welles,* 78 Fla. 227, 82

So. 770, a decision which was affirmed by this Court upon writ of error. See 260 U. S. 8.

Griggsby Const. Co. v. *Freeman, Tax Collector,* 108 La. 435, 32 So. 399, was a suit to enjoin the seizure of property for the payment of a delinquent tax. Among the taxes was a bridge ward tax,—in other words, a tax for the construction of a bridge levied on all the property in a ward of the parish. The court held that this tax was a general tax, saying:

> "The essentially characteristic feature of a local assessment is that it is levied on particularized property, and not on property generally. Charnock v. Levee Dist. Co., 38 La. Ann. 327. This feature is the corollary of what in theory, if not in actual practice, is the fundamental principle of the law of local assessment,—that the tax should be levied on each particular piece of property in proportion to the benefit it is to derive (not supposedly only, but actually) from the expenditure of the avails of the tax. The mere localness of the tax is not necessarily a distinguishing feature. Nor is the fact that the tax was imposed only after consultation of the taxpayers. Consultation of the taxpayers might have been dispensed with by the framers of the constitution in authorizing the imposition of the tax; and, on the other hand, local assessments may be, and every day are, levied without consultation of the contributors. As this tax, though local, is levied on property generally, and irrespective of special benefit, we conclude that it is not a local assessment."

See also

Wight v. *Police Jury,* 264 Fed. 705.

In *Louisiana & N. W. R. Co.* v. *State Board of Appraisers,* 120 La. 471, 45 So. 394, the Court held

that the tax of 10 mills authorized by Art. 232 of the Constitution (in force in 1900), to be levied in aid of public schools is not a special assessment, and therefore, property exempted from taxation by the Constitution, is not subject to it. The Court said:

> "The tax is shown to be an ordinary tax by the very fact itself of express authority having been given for its levy. The Constitution has left the power of taxation unlimited and untrammeled in that phase of it by which special assessments are levied. This is established by an abundant and firmly settled jurisprudence. Had this tax, therefore, been a special assessment, no express authority for its levy would have been needed, and none would have been given."

It is apparent that the reasoning of Mr. Justice BUTLER in the present case can be made applicable to taxes which are voted by a similar process for the erection of school buildings. It is a common and every day occurrence for application to be made that the boundaries of school districts be modified to permit the erection of improved school buildings, particularly in the case of high schools. This is done frequently by the voluntary action of the County Board of Education or Board of Supervisors, as the case may be without any hearing. Thereupon, a petition is presented signed by a specified number of voters, and an election is ordered on the question of issuing bonds in a specified amount and levying a tax for the purpose of erecting a specific building. Every element of a special assessment mentioned in the opinion in the present case applies under such circumstances. But PROVOSTY, J., in the Louisiana case last cited, says:

> "Indeed, the fact that the tax is in aid of the public schools shows conclusively that it is a mere ordinary tax. How could a tax in aid of the public schools be a special assessment when the maintenance of the public schools is one of the most ordinary of the ordinary charges of our government, and, by the most elementary principles, our government must have recourse to ordinary taxation for meeting its ordinary charges, and cannot have recourse to special assessments."

Everything that the learned Justice said with reference to public schools, is true of State highways, one of which is a Federal aid highway and is also true of county roads which are to be improved under the direction of the regular highway authorities, viz.: the County Commissioners Court, acting under and controlled to a certain extent by the State Highway Commission in the case of the State highway. The construction of highways and their maintenance is an ordinary obligation of government. They are rural highways, and although in some States, the practice has arisen of improving such highways by special assessments, such has never been the case in Texas.

On the subject of the distinction between general taxes and special assessments in Louisiana, see also,

> *Louisiana R. & N. Co.* v. *Madere,* 124 La. 635, 50 So. 609;
> *Charnock* v. *Levee Dist. Co.,* 38 La. Ann. 323;
> *Munson* v. *Board of Commissioners,* 43 La. Ann. 15, 8 So. 906.

In *Maltby* v. *Tautges,* 50 Minn. 248, 52 N. W. 858, the Court sustained an apportionment by the

County Commissioners of a bridge tax, although no notice or hearing was provided for in the statute authorizing the creation of the district. The district was created by the County Commissioners under statutory authority delegated to them by the Legislature.

Under Special Laws of Minnesota, 1889, amended by Special Laws, 1891, Chapter 359, the County Commissioners of Dakota County were authorized to issue bridge bonds of the County and to designate certain townships and parts of townships which should contribute to the payment of the debt. The County Commissioners, without notice and a hearing, designated seventeen towns and parts of towns as those which should contribute, and also designated the amount which each should contribute. The tax was contested on the ground it was not uniform in the several districts. The Court said, p. 251:

> "It is not questioned, and under the authorities could not be successfully, but that, where a tax is levied for some special or extraordinary purpose, such as this, and where in order to determine and fix the taxing district or districts and apportion the tax among them, it is necessary to enter upon such inquiries as to facts as cannot well be made directly by the Legislature, it is competent to refer the matter to the local authorities, or to a commission appointed for that purpose, to fix the taxing district or districts and to apportion the tax. Hence this case stands upon precisely the same footing as if the towns or parts of towns which were to contribute to the expense of building this road had been designated, and the expense apportioned among them, by the Legislature itself. * * * (p. 253). Taxing districts may be as numerous as the purposes for which the taxes are levied; and it is not essential that

> the political divisions of the State shall be the same as the taxing districts, but special districts may be established for special purposes wholly ignoring the lines of the political subdivisions of the State. * * * And, to give locality to a purpose in respect to which a public expenditure is to be made, it is not essential that the public work created by means thereof should have its *situs* within the district. It is the districts *interest* in the improvement, and not its location, which is the test whether an object is or is not a proper subject of district taxation. Hence the fact that the road constructed in this case was located wholly in one of the towns taxed is not important."

In *Gulf & S. I. Railroad Co.* v. *Ducksworth,* 286 Fed. Rep. 645, the railroad company sued to enjoin the collection of road district taxes under a statute of Mississippi. The Court held that in the manner in which the District was formed and the bonds authorized, there was no denial to the appellants of any right under the Constitution of the United States, KING, J., saying,

> "The tax was not a local assessment levied upon the theory that the improvement was a special benefit to the abutting property, but was an *ad valorem* tax levied on all of the property in the district, whether it abutted on said highway or not. * * * Here there is no assessment for a local improvement, but a special *ad valorem* tax levied on all the property in the road district on a valuation as to which no objection of any discrimination or unfairness is alleged."

In *Reed* v. *Howerton Engineering Co.,* 188 N. Car. 39, 123 S. E. Rep. 479, a sanitary sewer district in rural territory was created by the County Commissioners of Buncombe County under Public Local Laws 1923, Ch. 341, and bonds were voted

by the electors. It was claimed that the bonds were illegal and void for the reason that no notice was given or opportunity afforded to the property owners, whose property was affected by or included in the district, of a hearing on said matters, and no hearing was had, and that the boundary lines of said district were not fixed by the General Assembly, but the power to fix the boundary lines was delegated to a majority of the qualified voters of the proposed sanitary district who set forth the property to be embraced in the proposed sanitary district.

It will be seen from this statement that except for the purpose of the bonds, the case was substantially the same as Road District No. 2 of Archer County. After examination of the authorities, the Court sustained the validity of the formation of the district and the validity of the bonds as a proper and legitimate exercise of the power of the Legislature to delegate to the County Commissioners authority to create a taxing district.

> "In Bowles v. State, 37 Ohio St. 35, this court held, and we think correctly, that the levy under this one mile assessment law is a tax and not an assessment. Being a tax the general assembly derives its powers to levy the same from section one of article two of the Constitution, which vests all legislative power in the general assembly. The power of taxation so vested in the general assembly is supreme except as limited by other provisions of the Constitution, and the provision against the passage of retroactive laws, and laws impairing the obligation of contracts, is, in a proper case, a limitation upon the taxing power."
>
> per BURKET, J., in *Miller* v. *Hixson*, 64 Ohio St. at pp. 49, 50.

In *Howes* v. *Racine* (1856), 21 Wis. 514, it was held that a tax levied generally upon all property of a ward of the city to pay the expense of an improvement is a tax in the ordinary sense in which that term is used and not a special assessment.

In *Hale* v. *Kenosha* (1872), 29 Wis. 599, where the Court held that taxes levied upon the land in the city to pay for a subscription for a railroad extending beyond the city limits, are a tax as distinguished from an assessment; that the constitutional rule as to uniformity applies thereto, and that the tax cannot be levied on the lots excluding the improvements thereon, LYON, J., said:

> "In a general sense, taxes are burdens or charges imposed by the legislative power of a State upon persons or property for public uses, while assessments, as distinguished from other kinds of taxation, are those special and local impositions upon property in the immediate vicinity of municipal improvements, such as grading and paving streets, improving harbors or navigable rivers within the limits of the municipality, and the like, which are necessary to pay for the improvement and are laid with reference to the special benefit which property is supposed to have derived from the expenditure. Such assessments may be imposed upon a part of the property in a municipality, to the exclusion of the balance thereof; and this may lawfully be done without regard to the constitutional rule of uniformity or the value of the property upon which the cost of the improvement is charged. * * * We are not aware of the existence of any adjudged case, or of any principle of law, which authorizes an assessment upon specific property to defray the expense of making an improvement outside the corporate limits of the municipality in which such property is situated."

Decisions Denying That Rural Highways Can Confer Any Special Benefit.

In some jurisdictions it is held that the owners of property on or near an ordinary country road cannot be made to bear the expense of improving it; for a rural highway is not a "local improvement" and the benefit of improving it results to the general public.

See

Cooley on Taxation, 3rd Ed., Ch. 20, p. 1160, citing:
Graham v. *Conger,* 85 Ky. 582;
Conger v. *Bergman* (Ky.), 11 S. W. 84;
Conger v. *Graham* (Ky.), 11 S. W. 467;
Sperry v. *Flygare,* 80 Minn. 325;
In re Washington Ave., 89 Pa. St. 352.

In *Sperry* v. *Flygare,* above cited, decided in 1900, BROWN, J., referred to the hardship which resulted to property owners from the levy of special assessments for the improvement of streets and sidewalks in the larger cities, saying that they have

> "in some instances reached a point well nigh to confiscation."

He added:

> "Property owners of moderate means have been compelled to abandon their property, or sacrifice it by sale for much less than its actual value to avoid total loss."

But in the general tax, which we contend has been imposed upon the plaintiffs as owners of real estate in Archer County, at the rate of 4.17 cents per year for each acre, or an aggregate of about

$1.25 spread over a period of thirty years, there can be no such element of hardship or loss or confiscation. It is simply a reasonable imposition.

Brown, J., further points out, in the case cited, that in the city the improvement will benefit and improve the property abutting upon the improved street, but will not benefit property remote therefrom, while in the country districts, the highways are an advantage to the public at large and benefit thereto is not confined to farms through which they may pass. He also pointed out that drains or ditches constitute a peculiar benefit to lands adjacent to which they are constructed, such lands being thereby reclaimed and made suitable and fit for agricultural purposes, and thus furnishing a just and proper basis of determining that a special benefit existed. He made the same remarks with reference to other improvements in public streets, such as sewers, sidewalks, etc., and added:

> "But not so with reference to farm lands adjoining a public road. Such road is not a special benefit to the farm, or the owner thereof, independent of, and unconnected with, the public benefit. It might be such a benefit if in its construction and improvement it drained wet and swampy portions of the land, or improved the same in some other special way. But such highways are not ordinarily beneficial in those respects. In speaking on the subject of local improvements in the case of State ex rel. v. Reis, 38 Minn. 371, 38 N. W. 97, Mitchell, J., said: 'It is not the agency used, or its comparative durability, but the result accomplished, which must determine whether a work is an improvement in the sense in which that word is here used. The only essential elements of a "local improvement" are those which the term itself implies, viz., that it shall benefit the property on which the cost

> is assessed in a manner local in its nature, and not enjoyed by property generally. * * * This construction is fully warranted by the definitions of the word "improvements" given by lexicographers. It has been defined as "that by which the value of anything is increased, its excellence enhanced, or the like;" or "an amelioration of the condition of property affected by the expenditure of labor or money, for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes".' A rural highway does not come within this definition. Such a 'road is devoted to the public use. It is a country road in which the entire public is interested, and where the owners of adjacent land, although not touching the road, are equally benefited with those living directly upon it.' A highway extending through a county is not ordinarily of any greater benefit to lands through which it passes than to lands further removed therefrom."

Judge BROWN further declared that the Legislature might no doubt create and establish taxing districts and provide for the taxation of lands therein for the public improvements.

The significance of these rulings is, that the States of Minnesota, Pennsylvania and Kentucky seem to have adopted the rule that a rural highway cannot be a special benefit to abutting property so as to justify a special assessment, and it is impossible to improve the highway by any other means than by the levy of general *ad valorem* taxes.

In Texas there is no machinery by which a special assessment on the basis of benefits can be made against the property which abuts on the Southwest Trail or the Ozark Trail, or any other rural highway in the State. There is no way in which the

benefits can be determined or any investigation can be made, and there is no authority to raise the money in any other way than by a "tax". The term used is applicable and appropriate to a general *ad valorem* tax levied by reason of the performance of a governmental duty and the present case would seem to come within that line of decisions which holds that the power of taxation by special assessment cannot be exercised by a city or any other corporate authority unless the power has been expressly and clearly conferred by the Legislative Department of the Government.

See *Chicago* v. *Law,* 144 Ill. 569, where the cost of widening a river was sought to be assessed as a local improvement and the statute only authorized a "tax". It was held that the power to tax did not include the power to make a special assessment.

See, also, *Morgan Park* v. *Wiswall,* 155 Ill. 262, where a village was given authority to levy a "tax" for waterworks purposes. It was held that certain improvements were not of a local nature and special assessments therefore could not be authorized.

See, also, *Hughes* v. *Momence,* 164 Ill. 16, 19, where the City was authorized to levy a tax for the construction of waterworks, and it was held that it could not make a special assessment therefor by virtue of the authority conferred.

Wherever we turn, whatever principle we find, in every instance, the decisions are such as to deny the possibility that the powers exercised in the present case to levy a tax for improvement of rural highways can be regarded in any sense as imposing an impost in the nature of a special assessment based upon benefits.

IV.

The decision in the instant case is in conflict with a long line of decisions by this Court.

The procedure adopted by Texas in organizing road districts and issuing bonds, is not only justified by the decisions of the Courts, but is sanctioned by a line of decisions of the Supreme Court of the United States sustaining bonds and taxes over a period of fifty years. No question as to the validity of the districts or the regularity of the procedure has been suggested in these decisions.

The decisions cited above support the view that the Courts of the States have uniformly construed legislation such as is involved in this case to have been constitutional and valid, not only against the Constitutions of the States, but also as against the Constitution of the United Staes. They also show that the general view has been that a "tax" levied pursuant to such provisions is a general tax.

It is highly significant that a line of decisions is to be found in the reports of the United States Supreme Court which tend to sustain the organization of taxing districts in a manner almost identical with the present case.

In *Ogden* v. *Daviess County,* 102 U. S. 634, the Missouri Legislature by an act of January 4, 1860, incorporated the Platte City & Des Moines Railway Company (afterwards the Chicago & Southwestern Ry. Co.), and by section 7 of the Charter provided:

> "Upon the presentation of a petition of the President and directors of said company to the County Court of any County through which said road may be located, praying that a vote may be taken in any strip of country through which it may pass, not to exceed ten miles on either side of said road; that the inhabitants thereof are desirous of taking stock in said road and of voting upon themselves a tax for the payment of the same—it shall be the duty of said County Court to order an election therein * * * and if a majority of the taxable inhabitants shall determine in favor of the tax, it shall be the duty of said court to levy and collect from them a special tax."

Daviess County attempted to issue bonds, but the Supreme Court of the United States held that this statute did not authorize the issuance of bonds. But Chief Justice WAITE, who delivered the opinion of the Court, used language describing the obligation which rested on the inhabitants of the "strip" by reason of the provision above referred to, and declared that *"without doubt"* the charter authorized the taxable inhabitants to vote a tax upon themselves and required the County Court to levy and collect such a tax if voted. He said, p. 638:

> *"Without doubt* sect. 7 of the Charter of the Company authorized the taxable inhabitants of the 'strip of country' designated *to vote a tax upon themselves* to take stock and required the County Court to levy and collect such a tax if voted and pay over the money as fast as collected to the treasurer of the Company; but in this we find no authority for the County to issue bonds in anticipation of the tax. The taxable inhabitants of the strip of country could not themselves make a bond and all the county court could do was to collect and pay

> over the tax they voted. The inhabitants were not even organized by themselves, much less made a body politic for any purpose. They could vote the tax, if called upon to do so, by the County Court, but that was all. The effect of their vote was nothing more than to authorize the County Court to levy, collect and pay over to the treasurer of the Company, the special tax they had determined upon."

Again speaking of an act under which it was claimed that bonds might be issued and which expressly authorized the issuance of bonds by municipal townships, Chief Justice WAITE said:

> "Under the charter the taxable inhabitants of the strip were to take the stock and they were to be taxed."

He added:

> "Neither the county, nor a city, nor a town took the stock now in question. The county did not owe any debt. The taxable inhabitants of the 'strip of country' had authority to *vote to tax themselves* for the stock. In this way they could bind themselves, but that did not create a debt of the county as such, for which funding bonds might be issued. * * * The County Court and other officers of the County could be compelled to levy, collect and pay over the tax, but that was all the county or its officers were required to do."

This language indicates that Chief Justice WAITE had no question in his mind as to the validity of the charter provision above quoted, although it did not provide for notice and a hearing on the question whether the strip of country was benefited and whether a tax should be levied on it.

It is peculiarly significant that in the case cited, the "strip of country" was not defined by any body,

public official or even by its citizens, but was defined by the President and Board of Directors of the railroad seeking to have the tax levied and collected for it special use. Yet this fact did not make Chief Justice WAITE hesitate. It did not cause any doubt in his mind as to the validity of the tax which had been voted, otherwise he would not have declared that "*without doubt*" section 7 of the company's charter

> "authorized the taxable inhabitants of the 'strip of country' designated to vote a tax upon themselves."

See also *DeLand* v. *Platte Co.*, 54 Fed. Rep. 823.

In *Nebraska* precinct bonds have been issued, i. e., bonds which are the obligations of the county, but payable exclusively from precincts. These precincts have no corporate existence, and cannot contract or be contracted with. They have no corporate officers, and can neither sue nor be sued. Certain officers are elected by the voters of the precincts for political, administrative and judicial purposes, but they are in no sense the representatives of the people as in municipalities. The precincts are governed by the County Commissioners. Their relation to a county is like that of a ward to a city.

See,

Clapp v. *Otoe County*, 104 Fed. Rep. 472, 478.

Under the statute of *Nebraska*, bonds have been issued by counties for these precincts for internal improvements for many years. The election is called by the County Board on the petition of fifty freeholders, without any notice or hearing and the

proposition must be accompanied by a provision to levy a tax for the payment of the principal and interest of the bonds. (See Rev. Stat. Neb. 1913 §§410, 413.) The petition fixes the nature of the work contemplated, amount of bonds, rate of interest, and term of bonds. Under this statute, many bonds have been issued and it has never been suggested that the tax was a local assessment and not general *ad valorem* taxation.

See,

County Commissioners v. *Chandler*, 96 U. S. 205.

Bridge Bonds held to be valid. Mr. Justice BRADLEY saying:

> "Railroads, turnpikes, bridges, ferries, are all things of public concern, and the right to erect them is a public right."

Davenport v. *Dodge County*, 105 U. S. 237.

Bonds for wagon bridge held valid. Mr. Chief Justice WAITE, saying:

> "The only difference between the two kinds of debt is, that in one all the taxable property of the county is charged with its payment and in the other only a part. In both the mandamus to enforce the levy and collection of necessary taxes, lies to the proper officers of the County alone."

United States v. *Dodge County*, 110 U. S. 156. Bonds for a wagon bridge. Mandamus granted

> "to levy a tax on the taxable property of Fremont precinct."

Blair v. *Cuming County*, 111 U. S. 363. Bonds for improving water power of river for use of public grist mills held valid.

Nemaha County v. *Frank*, 120 U. S. 41. Railroad aid bonds and coupons held valid

> "the mode of payment being by means of a tax to be levied by the County Commissioners upon the property within the bounds of the precinct" (per Mr. Justice MATHEWS).

In *Clapp* v. *Otoe County*, 104 Fed. Rep. 473, *Sanborn*, J., who delivered the opinion of the Court, referred (p. 480, 482), to the fact that the County Commissioners had power to divide the County into precincts, to subdivide precincts and to alter precinct lines.

An Act of the Legislature of *Kansas* of 1870, in relation to railroad aid by townships required a petition of fifty qualified voters. Such petition framed the proposition to take stock in the railroad, designated the railroad company, the amount of stock to be taken and the terms of payment and conditions of subscription. When presented the County Commissioners were given no discretion but must call an election to be held to determine whether the subscription should be made. Whenever bonds were issued, it became the duty of the County Commissioners

> "annually to proceed to levy and collect a tax on all the taxable property in such township sufficient to pay the interest on such bonds as it becomes due and to create a sinking fund sufficient to pay said bonds at maturity."

Taxes were to be collected as county and township taxes are collected.

Marcy v. *Township of Oswego*, 92 U. S. 637, sustained the validity of bonds issued under this act, Mr. Justice STRONG saying, (p. 640):

> "The board was to order the election if certain facts existed and only then. It *was required* to act, if fifty freeholders who were voters of the township petitioned for the election; if the petition set out the amount of stock proposed to be subscribed; if that amount was not greater than the amount to which the township was limited by the act; if the petition designated the railroad company; if it pointed out the mode and terms of payment."

In *Humboldt Township* v. *Long*, 92 U. S. 642, bonds were issued under the same statute and the validity of the bonds was sustained. It will be noted that the railroad company was selected, the amount of stock was determined and the mode and terms of payment fixed by the petition, and the election was held upon the matters so fixed.

That the Courts considered the levies in these cases as "*taxes*," is shown by the language of the dissenting opinion in the Humboldt Township case, p. 647, were Mr. Justice MILLER said:

> "The *power of taxation* which has repeatedly been stated by this court to be the most necessary of all legislative powers and least capable of restriction, may by positive enactments be limited."

In *Missouri*, until recently, townships were only territorial subdivisions of the State for convenience in the administration of county matters. The Township Aid Act of Missouri of 1868, is set out in 95 U. S. pp. 361-363. When twenty-five persons, taxpayers and residents, petition the County Court setting forth their desire "as a township" to sub-

scribe to the capital stock of the railroad, stating the amount of the subscription, terms and conditions in which they desire such subscription shall be made,

> "it shall be the duty of the county court"

to order an election. If two-thirds of the qualified electors vote in favor, the bonds must issue. The means provided is

> "a special tax, which shall be levied on all the real estate lying within the township making the subscription in accordance with the valuation then last made by the county assessor for county purposes."

In *Harshman* v. *Bates*, 92 U. S. 569, it was held that this act was unconstitutional, as it did not require a vote conforming to the provisions of section 14 of Art. 11 of the Missouri Constitution, viz.: "two-thirds of the qualified voters," but only two-thirds of those voting at the election. This decision was overruled in *Cass County* v. *Johnston*, 95 U. S. 360. The court, in an opinion written by Mr. Chief Justice WAITE as to the enforcement of the obligation of the bonds in the United States Courts, said the court was

> "satisfied with the conclusions reached by the court below and that a judgment may be rendered against the county to be enforced if necessary by mandamus against the county court or the judges thereof, to compel the levy and collection of a tax in accordance with the provisions of the law under which the bonds were issued."

The New York Statute (N. Y. Acts 1869, Ch. 907), authorizing municipal corporations, includ-

ing townships, to issue railroad aid bonds, has been before this Court. That statute provided that whenever a majority of the taxpayers should make application to the County Judge by petition setting forth that they are a majority and represent the majority of the taxable property, and they desire that bonds shall be issued in an amount named in the petition and invested in the stock or bonds as the petition may direct, of a railroad company, it is the duty of the County Judge to publish a notice and to hold a hearing. At such hearing the County Judge must take proof as to the allegations of the petition and if it shall appear that the petitioners do represent a majority of the taxpayers and do represent the majority of the taxable property, he shall so adjudge and determine and forthwith appoint three persons as commissioners to issue the bonds. Bonds issued under this statute were before this Court in *Orleans* v. *Platt*, 99 U. S. 676, a suit upon interest coupons, in which judgment was rendered for the plaintiff. The judgment was affirmed. Also in *Lyons* v. *Munson*, 99 U. S. 684, where a judgment on coupons against the town was affirmed.

The hearing provided in this act is limited to ascertaining whether the petition has been properly signed. If it has been so signed, the Court must appoint the Commissioners and the bonds must issue. The amount of the issue and the railroad to be aided are selected by a majority of the property taxpayers and no hearing is held on these matters. This issue is not even authorized or fixed by the action of any elected representatives of the town. The amount of the subscription, the railroad to be aided and the question whether bonds shall be issued are determined by a body of individuals who

happen to own and represent the majority of the taxable property. No meeting of this body- is called; no election is provided for, and yet, this Court has sustained without question, the issuance of the bonds as fixed and directed by the body so selected.

In all of these cases, there has never been a suggestion by this Court that any provision of the Federal Constitution can affect the validity and regularity of the action. In *Ogden* v. *Daviess, supra,* the levy of a tax on a "strip of country" was set in motion on the petition of the officers of the railroad company. Under the *New York* statute, the entire question of issuing the bonds was fixed and decided by a private document circulated among a majority of the property taxpaying voters of the town, and thereupon all the property in the town was subjected to a tax. In *Nebraska,* on a petition arbitrarily selecting a precinct created for other purposes, an election is called to submit to the voters the question of issuing bonds for internal improvements,—improvements which, in their nature are peculiarly local,—yet it was never suggested by this court that these improvements were to be regarded as of such a nature that the tax levied therefor must be considered to be a special assessment. It was never suggested by this court at any point that notice and a hearing on the question of benefits was required in any of these cases.

Chief Justice WAITE declared that "without doubt" the tax voted at an election called on the petition of the railroad officers could be levied and collected. He had no question as to the regularity and validity of the procedure. If he had, it is in-

conceivable that he should have used the language which he did.

These cases illustrate that it has been the practice in the United States for fifty years at least, to permit the inhabitants of any territory that may be selected in any manner that the State proposes, to vote upon themselves *ad valorem* general taxes for the purpose of aiding in enterprises of a public nature. Such enterprises have taken many forms. Railroads, wagon and toll bridges, improvement of water courses, and other similar matters. Some of these at least are of the character which should be designated as local improvements.

In almost all of these cases, the purpose for which the bonds were voted was specific, i.e., the bridge, or a water course, or a grist mill, was identified. Yet it was never suggested that the bonds issued and the tax levied must necessarily be special assessments because they were voted and issued for a specific purpose.

It was never suggested in any of these cases that the impost which was levied might by any possibility be regarded as a local assessment for benefits and subject to the peculiar rules applicable thereto.

It is well known that the contest over these securities was prolonged and bitter. Every possible question was supposed to have been litigated in the cases which arose, and when this court sustained against all known objections, as it did, this method of procedure, it was natural that the States and officials and citizens should consider that they furnished a suitable and reliable guide for the issuance of securities for other works and improvements. The books may be searched in vain for anything to show that it was ever suggested that

the imposts levied in these cases and enforced by judgments of mandamus from this court were special assessments based upon benefits.

Surely, the people were entitled to rely upon the practice outlined in these cases as furnishing a rule for the guidance of officials and as embodying evidence of a practical interpretation of the law, bringing into operation the principles of *stare decisis,* rule of property, and practical interpretation.

V.

The steps taken by the petitioning voters, the county commissioners court and the voters of Archer County, have created a public and quasi-municipal corporation. The creation of such corporation is exclusively a State affair and does not involve any Federal question and the Legislature, without violating the Federal constitution may confer upon such corporation the power to levy general *ad valorem* taxes for the purpose of paying its corporate debts and liabilities.

By Art. 637, Texas Revised Civil Statutes, 1911, it is provided:

> "For the purpose of this subdivision of this chapter, any political subdivision of a county or defined district, now or hereafter to be described and defined, accepting the provisions of said subdivision, by voting such tax, is hereby made and created a body corporate, which may sue and be sued in like manner as counties."

In 1925 (Gen. Acts 1925, Ch. 132, p. 334) the legislature amended this section by adding the words,

> "and if cast in such suits, shall pay such judgments by the levy of taxes."

It is within the power and discretion of the Legislature of Texas to give the district so created, a public or quasi-municipal corporate character, and the action of the Legislature in so doing, did not violate any provision of the Federal Constitution.

Kelly v. *Pittsburgh*, 104 U. S. 78, involved the power of the City of Pittsburgh to tax annexed farming lands, which the plaintiff claimed had arbitrarily been annexed and should not have been subjected to taxation for urban purposes. This Court conceded that quite probably the exaction was unjust, so far as the plaintiff was concerned, saying, per Mr. Justice MILLER, at p. 80:

> "The distinct ground on which this provision of the Constitution of the United States is invoked is, that as the land in question is, and always has been, used as farm land, for agricultural use only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire."

Mr. Justice MILLER further added, page 80:

> "It is not denied that the legislature could rightfully enlarge the boundary of the city of Pittsburgh so as to include the land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a State shall be within the limits of a city

> and be governed by its authorities and its laws has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city must be settled is one of the matters within legislative discretion. Whether territory shall be governed for local purposes by a county, city, or a township organization, is one of the most usual and ordinary subjects of State legislation."

In the year 1925, based upon long established practice, Road District organizations must be added to the list.

In *Forsyth* v. *Hammond,* 166 U. S. 506, where the Indiana Legislature authorized the annexation of contiguous territory with or without the consent of the owners, this Court ruled that no question could arise as to the validity of the annexation under the Constitution of the United States, saying, page 518, per Mr. Justice BREWER:

> "It is for the State to determine its political subdivisions, the number and size of its municipal corporations and their territorial extent. These are matters of a local nature, in which the nation, as a whole, is not interested, and in which, by the very nature of things, the determination of the state authorities should be accepted as authoritative and controlling."

Mr. Justice BREWER further added, page 519:

> "It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature."

So, too, there is nothing in the Constitution of the United States, which prevents the State of

Texas from confiding the organization of the territory of a district to any body which it desires, such as the County Commissioners Court, even, the property taxpaying voters. We have seen that the late Mr. Chief Justice WAITE expressed the opinion that "without doubt" the president and Board of Directors of a railroad company might set in motion and reasonably define the boundaries of a "strip of country" for the purpose of taxing that strip in aid of the railroad in which they were interested.

In *Claiborne County* v. *Brooks*, 111 U. S. 400, Mr. Justice Bradley, said:

> "It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State."

In *McCain* v. *Des Moines*, 174 U. S. 168, the Supreme Court of Iowa had held an act purporting to extend the limits of the City of Des Moines to be unconstitutional, because it violated the constitutional provision in regard to special legislation. That Court, however, refused to issue *Quo Warranto* on the ground of laches, the territory having been annexed in fact for over four years, and the original organization having been abandoned. Mr. Justice PECKHAM, who delivered the opinion of this Court, held that the plaintiff, who claimed among other things that his property was being taxed by Des Moines for city purposes without color of right in violation of the Fourteenth Amendment of the Federal Constitution, had no standing for redress

before the Courts of the United States, saying, among other things (pp. 175, 176):

> "It will thus be seen that while the Supreme Court of Iowa decided that the act purporting to extend the limits of the city was void as being in violation of the constitutional provision in regard to special and local legislation, yet the court also held, for the reasons stated, that it was sufficient in itself to constitute, under the circumstances mentioned, a color of law for the annexation, and for the application of the principles of estoppel as above mentioned. The legality of the present city organization was for those reasons sustained. * * * To grant the relief demanded would quite effectually *overrule the decision of the state court upon a question relating purely to the local law of the State.*"

Taxation is a legislative power, yet this decision says that although taxation is a legislative power, it may be based not only upon legislation which is concededly unconstitutional and invalid, but upon estoppel and mere color of an unconstitutional law without violating the Fourteenth Amendment. If general taxes for city purposes levied on the plaintiffs in *McCain* v. *Des Moines, supra,* did not raise any Federal question, giving this Court jurisdiction, then in what sense can it be said that a general road tax levied *ad valorem* upon all real and personal property in the district according to the assessment for State and county purposes and to be applied under the statute in the discretion of the governing authority on such roads as it may select, raises a Federal question? The grievance of Mr. Browning and his co-plaintiffs in the present case is insignificant compared with the claim for redress which the plaintiffs in *McCain* v. *Des*

Moines had, and yet this Court denied redress in the *De Moines* case.

These principles were re-affirmed in *Hunter* v. *Pittsburgh,* 207 U. S. 161 (1907). That case involved the annexation to the City of Pittsburgh of the City of Allegheny, and the transfer of all the corporate property of the City of Allegheny to the custody and control of the City of Pittburgh. The statute under which this was done, was a general act permitting the consolidation of two cities contiguous or in close proximity to each other, with any intervening land other than boroughs. The council of either city or two per centum of the registered voters of either city might present their petition to the Court of Quarter Sessions of the County in which the cities are situate, and the Court shall fix the time for the hearing thereof, direct notice to be given. Any person interested might file exceptions

> "but if the court shall find that the petition and proceedings are regular and in conformity with this act"

(in other words, the bare fact of the cities being contiguous or in close proximity and the lands to be included being intervening lands other than boroughs, and that the petition was signed by the requisite number,) the court shall order an election. The election was held. The population of the City of Pittsburgh voted for annexation. The population of the City of Allegheny voted against annexation, but the Court held that the vote controlled, although Pittsburgh having the greater number of voters could and did vote to take to itself the property of the City of Allegheny, against the vote of the citizens of Allegheny. It was held that no Federal

question was raised and the bill was dismissed. The claim was that the Federal Constitution was violated because the method of voting on the consolidation prescribed in the act permitted the voters of the larger city to overpower the voters of the smaller city, and compel the union without their consent and against their protest. (See 207 U. S. p. 177) Mr. Justice MOODY summed up the decisions of this Court at p. 178 and 179, his conclusion being:

> "The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. *In all these respects the State is supreme,* and its legislative body, conforming its action to the State constitution, may do as it will, *unrestrained by any provision of the Constitution of the United States.*"

It follows from these decisions that this Court has no power under the Federal Constitution to review the steps by which Road District No. 2 of Archer County became a public or *quasi*-municipal corporation of the State of Texas. That is a question to be decided by State polity. The decisions of the Courts of Texas on that subject are controlling, and if as we have seen, the Supreme Court of Texas has sustained the validity of such organizations and has held that they have been vested with the power of general taxation *ad valorem* for general highway purposes, such decisions do not at any

point contravene any provision of the Federal Constitution and this Court is without jurisdiction.

The method in which Road District No. 2 of Archer County was created, is substantially the same as that in which municipal corporations are created, not only in Texas, but also in many other States of the Union. It has never been suggested that these municipal corporations are created in violation of the Constitution of the United States, although they are vested with similar powers of taxation to those conferred upon the road district in the present suit. The Texas statutes in relation to the creation of towns and villages will be found in Texas Revised Civil Statutes, 1911, Arts. 1033, et seq., and particularly, Art. 1036.

VI.

No Federal question arises by reason of the act of the Legislature in conferring, and the decisions of the Supreme Court in construing, the power conferred as embodying the right to levy a general tax.

We respectfully invite a statement of the language which will confer a grant of general power of taxation. If this application is denied, the State of Texas will need such an expression for its guidance, because it is inconceivable that it will permit any default in the obligations which have been issued, or that it will substitute any tax, other than that upon the faith of which the obligations now out, have been sold. When the Legislature of Texas comes to meet this decision, in the event that a rehearing be not granted, in

what language will it frame the statute, so as to clearly grant an express power of general taxation?

The Constitution of Texas, Article 3, section 52 as amended, confers the right to levy a "tax." The Act of 1909, under which District No. 2 of Archer County is organized, provides for the levy of a "tax" or "taxes."

In the case of the statute, the exact language is that the bonded debt of the county incurred under the act, shall be paid from

> "a tax sufficient to pay the interest on such bonds and to produce a sinking fund sufficient to pay the bonds at maturity."

It will be noted that the tax is not levied to construct highways, but to pay the debt.

The further provision is added:

> "Said tax *herein authorized* shall be assessed and collected in the same manner as is now provided by law for the assessment and collection *of other road taxes* if for a whole county, and if for a political subdivision or other defined district of a county, then it shall be assessed and collected as is now provided by law for the assessment and collection of common school district special local taxes. And it is hereby made the duty of such Commissioners Court to levy such tax, and it is hereby made the duty of the Tax Collector and Assessor of such County wherein such taxes have been levied, to assess and collect the same in the same manner and at the same time as other taxes."

In the present case, Mr. Justice BUTLER says,

> "Resort may be had to general taxes and to special assessments to raise funds for the construction or improvement of roads"

citing, *Missouri Pacific Railroad* v. *Road District,* 266 U. S. 187, 190. In the case cited, Mr. Justice BRANDEIS said, p. 190:

> "Road building is a public purpose which may be effected by general taxation. The cost may be defrayed out of state funds; or a tax district may be created to meet the authorized outlay. The preliminary enquiry whether it is desirable to construct the road, is one in which all landowners within the district are interested. The Fourteenth Amendment does not require that taxes laid for this purpose shall be according to the benefits to be received by the person or thing taxed. Compare Kelly v. Pittsburgh, 104 U. S. 78."

We understand this language to necessarily mean that the imposition of a general *ad valorem* tax, although upon the limited district and not upon the State at large, does not present any question under the Fourteenth Amendment to the Federal Constitution. With all due deference, we submit to the Court that the language used in the act in relation to the imposition of the tax is just such as will be found in the case of a general tax as distinguished from a special assessment. It is the same language which has been repeatedly used in laying taxes for governmental purposes and it is *not* the language which is usually used when a special assessment is imposed. Even if there be a disposition to elevate a special assessment to the dignity of a tax, the impost will usually be described as a special local tax, rather than simply a tax on all the taxable property to be levied and collected in the same manner as other general taxes are laid.

We have shown above (Point V), that neither the organization of a public or quasi-municipal corpor-

ation, nor the powers which the State confers upon it *per se* raises any question under the Federal Constitution. It is within the power of the State to confer upon it such powers as it deems necessary. One power that is essential for corporate purposes, is the power of taxation, and it is significant that if this statute had not included any express grant of authority to levy a tax, yet, inasmuch as it created defined districts into public or quasi-municipal corporations and authorized them to issue bonds and lend their credit, the grant of the power to issue bonds and to lend their credit would have conferred upon them the power to levy a general tax according to the established methods of general taxation.

> "*When authority* to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom, indeed, as to be exceptional—any means to discharge their pecuniary obligations except by *taxation*. It is therefore to be inferred,' as observed by this court in Loan Association v. Topeka (20 Wall 660), 'that when the legislature of a State authorized a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference'."

Per FIELD, J., *United States* v. *New Orleans*, 98 U. S. 381, 393.

See also:

Ralls County v. *United States*, 105 U. S. 733;

Breckenridge County v. *McCracken*, 61 Fed. 191;

United States v. *Saunders*, 124 Fed. 124, 128, 59 C. C. A. 394.

The power to levy a tax implied in the power to create a debt must of necessity relate to a general tax. An assessment for benefits requires special means of levy which do not usually exist without express legislation, but the means of raising money by general taxes is all pervading and continuous and can be availed of for the purpose of executing the implied grant of power.

What difference does it make that this power has been expressed? Is that any reason for holding that the language used does not mean just what it says? If the express power to issue bonds and create debt would carry an implied power of general taxation without expression, should not the same meaning be applied to the expressed power, in the absence of anything to distinctly convey a contrary meaning?

Even if this language were susceptible of the construction which the Court has placed upon it in the main opinion in the present case—something which we do not concede—the decision of the Court in so construing the statute, violates all the recognized canons of construction.

> "The rule is fundamental that if a statute admits of two constructions, the effect of one being to render the statute unconstitutional and of the other to establish its validity, the courts will adopt the latter."

per SUTHERLAND, J., in *Arkansas Gas Co.* v. *Railroad Commission*, 261 U. S. 379, 383.

See also:

Utah Mines v. *Beaver County,* 262 U. S. 325, 331, per SUTHERLAND, J.;

Texas v. *Eastern Texas Railroad Co.,* 258 U. S. 204, 217, per VAN DEVANTER, J.

> "This Court by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome *beyond rational doubt.*"

per SUTHERLAND, J., in *Adkins* v. *Children's Hospital,* 261 U. S. 525, at 544. Cited and quoted in *Everard's Breweries* v. *Day,* 265 U. S. 545, at p. 560, by SANFORD, J.

> "Both the meaning of statutes of a State and the rules of the unwritten law of a State affecting property within the State are peculiarly questions of local law to be ascertained and established by the State courts. For that reason Federal courts ordinarily hold themselves bound by the interpretation of State statutes by State courts."

per STONE, J., in *Edward Hines Trustees* v. *Martin,* 268 U. S. 458, at 462.

> "But in passing upon such questions we follow applicable decisions of the highest court of the State."

BRANDEIS, J., in *Douglas* v. *Noble,* 261 U. S. 165, 168.

> "The plaintiff in error recognizes that this court is bound by the construction given to the State law by the State court, yet wastes a good deal of argument in the effort to prove the construction wrong."

Mr. Justice HOLMES, *in Yeiser* v. *Dysart,* 267 U. S. 540, 541.

> "It is a 'settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons'."

per Mr. Justice BUTLER, in *Swendig* v. *Washington W. P. Co.*, 265 U. S. 322, at p. 331, quoting from Mr. Justice VAN DEVANTER in *Logan* v. *Davis*, 233 U. S. 613, 627.

> "Even if the meaning were not otherwise made plain, we should be slow to reject the construction thus put on the section by the head of the department charged with administering it."

per Mr. Justice VAN DEVANTER, in *Kern River Co.* v. *U. S.*, 257 U. S. 147, 154.

See also,

La Roque v. *U. S.*, 239 U. S. 62, 64, per Mr. Justice VAN DEVANTER.

The practical construction placed upon the road district statutes, not only in Texas, but in other States, has uniformly been that a tax to pay district debts incurred for road construction purposes levied *ad valorem* upon all the taxable property in the district, both real and personal, according to the State and county assessment, is a general tax for every purpose. We have exhaustively examined the decisions, and our research has not disclosed to us a single case where such a tax has been held to be a special assessment.

The Legislature of Texas has so construed it, and has used apt language to confer a general power of taxation. The Courts of Texas have so applied it.

The general construction placed upon the terms has been that it is a general tax and many millions of securities payable from a tax of this nature have been issued, not only in Texas, but in ten or fifteen other States, as well. All of these securities are brought in question to some extent by the decision in the present case.

The decisions of the Courts, other than the Courts of Texas, have held similar taxes to be general taxation. There is a line of decisions in the reports the Supreme Court of the United States which is inconsistent with any other view than that a tax levied in the manner in which this tax was levied, is a general tax, which decisions never suggested the contrary or indicated that the impost might be a special assessment to be governed by the rules peculiar to special assessments. These decisions cover fifty years and offer evidence that the practical construction placed upon similar statutes, even in the Supreme Court of the United States, has been that this tax is a general tax. To such an extent has this been the case, that we respectfully submit to the Court that the present is a proper case to apply the principles of *stare decisis—rule of property* based upon acquiescence in the long line of decisions—and *practical construction* in the administration of the affairs of the respective States of the Union. The meaning of the term "tax" when used as in the present case, has become fixed and is a part of

> "the settled laws of the State applicable to all persons in like circumstances and conditions,"

a situation which does not come within the Fourteenth Amendment. We also submit, to use the

language of Mr. Justice SHIRAS, in *Cass Farm Co.* v. *Detroit*, 181 U. S. 396, 398:

> "It was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation."

VII.

The evidence does not establish that Archer County Road District No. 2, was arbitrarily created or that the definition of its boundaries was a plain abuse of statutory authority.

We have heretofore argued, and we trust persuatively, that this District was formed, not for the purpose of levying an assessment on the basis of benefit, but in the legitimate exercise of the power of the State of Texas to create a public or quasi-municipal corporation, having the general power of taxation for road purposes. This argument is directed to sustaining the validity of the act of the Legislature of Texas. A different question is presented when the action taken under the statute is attacked on the ground that it was arbitrary and a plain abuse of discretion. This argument goes to the manner in which the statutory powers were exercised and assumes the existence of a valid statute.

It does not clearly appear from the opinion of Mr. Justice BUTLER whether this Court was of the opinion that there had been arbitrary action or abuse of discretion. Various remarks, however, have been made which tend to suggest that such was the opinion of the Court.

On this subject we wish to call the Court's attention to the fact that as stated in Mr. Justice BUTLER'S opinion, Road District No. 2 contains approximately one-half of the County, which is thirty miles square; that is to say, the extent of the District is thirty miles easterly and westerly, and fifteen miles in a northerly and southerly direction at least. In many eastern States, Counties have less territory than this District.

We have also pointed out above, that the assessed value of the plaintiffs' property consisting of 24,900 acres and any personal property that the plaintiffs may have in the District, is at the rate of $10.33 per acre. We have also shown above that the tax upon the plaintiffs' property on the basis of the first year's assessment is 4.17 cents per acre, or a total of $1.25 per acre spread over a period of thirty years.

We have also pointed out that the improvements involved in this case are the improvement of the "Ozark" Trail and the "Southwest" Trail, two State highways, State and inter-State in character, and in addition, two short stretches of county highways. There is no evidence in the case that the improvements to be made upon these highways will specially and peculiarly benefit any part of the District. So far as the testimony in the case goes, the benefit is general and it applies equally to all the lands in the District. There is no benefit of a special and peculiar nature such as is implied in an assessment of benefits.

The opinion of the Court below also refers to the fact that the District contains two Commissioners Precincts, although Mr. Justice BUTLER points out that there is no evidence of this fact. Possibly, it may have been conceded at the trial, or assumed

to be the case, as one of those facts within local knowledge. We do not understand that it is seriously disputed that such is the fact.

These rural improvements are the subject of local discussion for months in advance. The defendant Hooper testifies that such was the case in Archer County (Tr., fols. 70, 74). There were many meetings throughout the County at which the matter was discussed. The Commissioners were trying to arrive at some scheme, some understanding, so that everybody could vote for bonds for the entire County and not have it cut up into Districts (Tr., fol. 74).

The County was broken up in *blocs* and cliques; each wanted improved highways immediately adjacent his property; these plaintiffs frankly say so in their testimony (See, Edgin, plaintiff, fol. 98; Gant, plaintiff, fol. 103). The objection of each is the selfish objection that a road nearer him would benefit his property more. The testimony is the familiar testimony that no road except the particular road the witness desires can possibly be a benefit.

As against these the Commissioners acted for the benefit of the community as a whole. They sought the roads that would be the greatest benefit to the community. The "Ozark" and "Southwest" Trails, being State highways, State aid is available; the Ozark being a Federal highway, Federal aid is available. The Commissioners seek to take advantage of State and Federal aid; they designate these Trails,—the main roads in the northern half of the County. In so doing, they are surely furthering the interest of the community? These roads would not have been selected by the State for improvement, if they had not been the

most important highways in the District from the standpoint of the general public and the State, and that fact alone points to them as the roads to be first improved.

A county wide issue being impossible by reason of local jealousies, the selection of a District consisting of the northern part of the County through which these roads run is the natural alternative. The Commissioners took a broad view of the situation:

> "We figured the future growth of the county hinged on its transportation facilities and anything that would better the transportation facilities will certainly benefit the property of the residents of the County. It is too big a question for me to go into. * * * It is a system of highways all through that District that is a benefit to the District. The natural market place of the District is Wichita Falls. All of these roads pass through Wichita Falls." (Hooper, County Judge, Tr., fol. 72.)

The situation, therefore, discloses the setting apart of a large tract of territory which evidently requires improved highways and the expenditure of the major part of the moneys to be derived from the sale of this issue of bonds, in the improvement of two State highways which are required to give easy and satisfactory access to markets outside the District and presumably are the principal roads in the District. The County highways which are improved are apparently intended to connect with these State highways and the whole enterprise bears the marks, we submit, of such an enterprise as is intended to benefit the community, rather than the individuals.

It is stipulated in the present case that a Federal highway is entitled to dollar for dollar from

the Federal Government, and dollar for dollar from the State Government for each dollar expended by counties or subdivisions thereof (Tr., fol. 108.) This stipulation discloses the reason for the selection of these highways. The County Commissioners simply sought to take advantage of these aids, in the interest of the community as a whole.

Under these circumstances, we submit that the action of the County Commissioners Court in defining the boundaries of the District was reasonable, and that the plaintiffs were not prejudiced thereby.

The plaintiffs are not consistent. They seek to enjoin the defendants from doing that which the plaintiffs themselves sought to do. The plaintiffs openly admit that they seek roads of their choosing. The difference is, the roads selected have been selected with the public benefit in view. The plaintiffs ignore the public benefit and seek the improvement of roads for their exclusive benefit. Munchrath, a defendant and County Commissioner, has contributed to the prosecution of this action against himself (Tr., fol. 92). He wishes a road along the easterly boundary of the District.

> "I want to get a road somewhere that I can get out" (fol. 93).

He is indifferent to the improvement of the two Trails, though the action of the State and Federal governments has stamped them as trunk lines. Edgin, plaintiff, is in favor of good roads. He wants a road that will benefit him (fol. 98). He also is indifferent to the public interests.

Plaintiffs want another kind of district; one that will benefit their own property, even if it create debt up to the constitutional limit on a narow strip along the eastern boundary; and the roads to be

constructed therein are roads which none except those living immediately upon them ever use. They are not roads which have been adopted by the Federal and State government as main roads for immediate improvement for the general benefit. Plaintiffs do not care if a small district created according to their desires, will create a debt to the constitutional limit so that a wide and general improvement will be gravely hampered. The aims and objects of this suit are, not elevating, but purely selfish; they are aims and objects which certainly are not protected by the Fourteenth Amendment.

The popular sentiment, or rather, the sentiment of the property taxpaying voters, was strongly in favor of this District and the issue of bonds. Out of 405 votes, 303 votes were cast for and only 102 against the bond issue. The Constitution of Texas, as amended, refers the matter ultimately to the vote of the taxpaying voters and we respectfully submit that where the Constitution of a State—the organic law under which both plaintiffs and defendants live and hold their property—says that the creation of a public and quasi-municipal corporation may be effected by a popular vote and by the same means debt may be created and voluntarily taxes imposed, the Federal Courts are neither qualified, nor have they the machinery or the right to annul the exercise of a right of suffrage granted by the State, which in its nature, cannot impinge at any point on the Fourteenth Amendment.

We therefore respectfully submit that there is no room in the present case for the application of those decisions which say that the organization of a district for improvement purposes which is palpably arbitrary and an abuse of discretion, will be obnoxious to the provisions of the Fourteenth Amendment to the Federal Constitution.

VIII.

The attention of the Court is respectfully called to the fact that the Texas statute authorizes the issuance of bonds by counties and political subdivisions thereof, as well as by defined districts, and we respectfully ask the Court to make it clear, even if this application for a rehearing be denied, to what extent its decision is intended to apply to counties and political subdivisions.

The language of the opinion of the Court in this case is susceptible of the interpretation that even if the bonds were to be issued by the County as such, the taxes therefor would be regarded as a special tax for a special improvement. Thus, among other things, the opinion says:

> "The Commissioners Court is authorized to levy general taxes for road purposes up to a stated maximum on each $100 valuation. Art. 2242, Const. Art. 8, section 9. The expenditure of the moneys so raised is not limited to any specific roads."

This remark implies that even if the bonds are voted and issued by the County as such the moneys are to be expended for limited and specific purposes. Elsewhere the opinion further suggests the idea that in the opinion of the Court the statute contemplates the expenditure on specified roads only. We have endeavored to establish that such is not the case, but if we should not succeed in persuading the Court that such is not the case in the case

of defined district, is it to be assumed that the County is controlled by the same rules?

The same remarks apply to bonds issued and improvements constructed within political subdivisions of the counties.

Whilst it is scarcely to be believed that the Court intended to say that a tax levied by the County for road purposes on all the taxable property in the County according to the assessment for State and County purposes and to be applied in the payment of county obligations issued for road purposes, is a special assessment for a local improvement, yet it does not clearly appear that such was not the thought and the view of the Court, and we respectfully ask the Court to make it clear that there is nothing in its opinion which was intended to apply to that situation. This request is respectfully made in the interests of the many persons holding securities issued by the counties of Texas for road purposes.

IX.

WHEREFORE, your petitioner respectfully prays that a rehearing be granted herein, and that upon the rehearing, if granted, such decree may be made as the premises require.

DAN MOODY,
Attorney General of Texas.

C. A. WHEELER,
Assistant Attorney General of Texas.

JOHN W. DAVIS,
JOHN C. THOMSON,
W. P. DUMAS,
Of Counsel.

The undersigned respectfully certify that they believe that it is proper that a rehearing should be granted in this cause and that the application therefor is made in good faith and not for delay.

DAN MOODY,
Attorney General of Texas.

C. A. WHEELER,
Assistant Attorney General of Texas.

JOHN W. DAVIS,
JOHN C. THOMSON,
W. P. DUMAS,
Of Counsel.

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WM. R. STANS

IN THE

Supreme Court of the United States

OCTOBER TERM—1925.

No. 256.

PERRY BROWNING, WM. COLEMAN, JAMES E. DALE, *et al.*,

Appellants,

v.

E. M. HOOPER, E. A. McDONALD, A. L. BISHOP, *et al.*,

Appellees.

PETITION FOR REHEARING AND ARGUMENT.

JOHN R. MOORE,
W. E. FORGY,
Attorneys for the Appellees and Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1925.

PERRY BROWNING, WM. COLEMAN, JAMES E. DALE, *et al.*, Appellants, v. E. M. HOOPER, E. A. MCDONALD, A. L. BISHOP, *et al.*, Appellees.	No. 256.

PETITION FOR REHEARING AND ARGUMENT.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of E. M. Hooper, E. A. McDonald, A. L. Bishop, E. A. Herndon, and Henry Munchrath, respectfully shows that your petitioners are the duly elected, qualified and acting Commissioners of Archer County, Texas; that they constitute the County Commissioners Court of said County; that this petition is filed on behalf of your petitioners as such Commissioners and also on behalf of the County Commissioners Court of Archer County, and of Road District No. 2 of Archer County, a public corporation.

Your petitioners further represent and state to the Court that the opinion in the action declares to

be unconstitutional a statute of the State of Texas, and has held that Road District No. 2 of Archer County is not validly organized under the said statute and cannot issue the bonds of said Road District referred to in the complaint herein.

Your petitioners respectfully show to the Court that since the opinion herein was handed down, the principles embodied therein, the practice under the act of the Legislature of the State of Texas which was before the Court, and the decisions and practice in other States have been the subject of much investigation and discussion, and your petitioners respectfully represent to the Court that such investigation and discussion have made it appear that the arguments on behalf of the defendants and appellees herein to sustain the organization of the District and the validity and regularity of the tax voted to secure the payment of the bonds herein and the constitutionality of the said statute, were not adequately and fully presented.

Your petitioners further respectfully represent to the Court that the opinion herein indicates that this Court has reached the conclusion that by the act of individual property taxpayers, a special district was carved out to furnish credit to pay for specified improvements on designated roads; that the existence of the district continuing during the term of the proposed bonds will prevent the improvement of roads needed to serve the territory in which the plaintiffs' lands are situated; that the purpose is special and the burden sought to be imposed on appellants' lands are special assessments for local improvements; whereas, your petitioners respectfully show to the Court that this construction is contrary to the decisions of the Courts of the State of Texas and the recognized and accepted

practice of the officials of said State in proceedings under the act.

Your petitioners further respectfully show that according to the accepted practice and according to the decisions of the State of Texas, roads are not designated as part of the petition for the creation of the District and the issuance of bonds; that the designation of the roads is a matter within the discretion of the County Commissioners Court and such roads need not be designated otherwise than by directing the expenditure of the moneys raised by the issuance of the bonds; that such discretion may be exercised at such time and in such manner as the Commissioners Court deems best in the public interest; that your petitioners have been advised by counsel that the County Commissioners Court is not deprived of discretion as to boundaries of the district, but it is its duty to enter an order fixing such boundaries and in so fixing the boundaries it is obliged to conform to the law, including those decisions of this Court which say that no district can be formed so as to arbitrarily deprive a man of his property without due process of law.

Your petitioners also respectfully show that they have been advised by counsel that it is within the discretion of the County Commissioners Court to fix such boundaries as said Court may deem proper and appropriate, and if the petition before the Court does not apply to such boundaries as fixed, then the petition must be either amended or denied.

Your petitioners further respectfully represent to this Court that a single issue of bonds does not exhaust the power and authority of the District; that it is within the power of the property taxpaying voters to present further and additional peti-

tions proposing the issuance of additional bonds; that this course may be followed by successive petitions until bonds have been issued to the ultimate limit of twenty-five per cent of the assessed value of the real property of the District, and the proceeds may be expended in the same manner on such roads as the Commissioners Court deems most to the public interest.

Your petitioners further respectfully show to the Court that the petition in this case had not for its primary purpose the making of the improvements, but rather the raising of money by which improvements may be made; that the purpose of the act is to authorize counties, political subdivisions thereof and defined districts to borrow money and to lend their credit for public purposes; that the tax to be levied is a tax which is appropriate and suitable for an issue of securities which are to be disposed of in open market; that such a tax is usually a general *ad valorem* tax and is not a special assessment based upon a local improvement.

Your petitioners further respectfully show to this Court that the obligations created by the issuance of bonds of defined districts must be met from the tax provided whether the improvements have been built or not; that the obligations constitute corporate debts which must be paid in any event without regard to the benefit to the property owner; that the roads and highways which are to be improved, form a part of the State and County system of highways; that the defined district as such has no power and jurisdiction over the improvement thereof, but the proceeds of the bonds are to be paid over and delivered to the County Commissioners' Court and are to be by it expended in the same manner as other money raised for the

improvement of public highways, *i. e.*, in the improvement of such highways within the district as best suits the interests of the community, and not in the improvement of highways for the purpose of benefiting any individual or sets of individuals.

Your petitioners further respectfully show that by the proceedings of the property taxpaying voters, the order of the County Commissioners Court defining the district, and calling the election, and the vote of the property taxpaying voters, a public or quasi-municipal corporation has been created with powers conferred thereon by statute of Texas; that such creation and grant of pow r raise questions only under the laws of the State of Texas, and do not present any Federal question; that it is within the power of the State of Texas to confer upon a corporation so created, the power of general taxation *ad valorem* for highway purposes without any relation to the benefit; that such power has been so conferred and the conferring of such power does not present any question under the Fourteenth Amendment to the Federal Constitution.

Your petitioners further respectfully show that they believe that if the foregoing reasons had been properly and adequately presented to the Court, a decision holding said statute unconstitutional would not have been rendered, but, on the contrary, the validity of the statute would have been sustained.

WHEREFORE, your petitioners respectfully pray that a rehearing on the appeal herein be ordered, and in support of the prayer of this petition for such rehearing, they respectfully submit to the court the following:

ARGUMENT.

I.

The correct construction of the Texas Statute does not contemplate specified improvements on designated roads or the levy of a special assessment.

The roads to be constructed are the "Ozark" Trail,—a Federal Aid road, as well as a State road, —and the "Southwest" Trail,—a State Highway,— and two short highways connecting therewith. The territory embraces the northerly half of Archer County, or approximately five hundred square miles. It is not any carefully selected territory paralleling or immediately bounding upon any highway, but is a territory of such extent that the Legislature of Texas might, if it saw fit, properly create it into a separate County.

The tax upon plaintiff's lands is only a few cents per acre per year, on the basis of the present assessment, and there is no individual hardship so far as the plaintiffs are concerned. Their rights and interests are presumably much better protected than if they were subjected to an assessment of benefits. It is difficult to conceive that any property could be as lightly taxed, even if the assessment were on the basis of benefits.

When the constitutional amendment of 1904 was adopted, the power of counties in Texas to levy taxes was very limited. The primary purpose of that constitutional amendment was the increasing of the power of taxation so as to create credit on the part of the counties, political subdivisions and

defined districts thereof. The existing general county road tax referred to in the opinion of the Court was wholly inadequate to meet highway requirements. The 1904 amendment was supplementary to the existing statute, not—as the opinion suggests—in contrast to it. The taxes to be levied were of the same general nature as the taxes which had previously been levied. This is shown by the use of the word "taxes" in the amendment of 1904. The purpose of the act related to means by which improvements should be made, i. e., by issuing bonds or otherwise lending credit, and by the levy of taxes, and did not relate so much to the actual making of the improvements. There is little in the act on the latter subject. It is left substantially to the general laws of the State.

The Supreme Court of Texas has referred to the fact that the purpose of the act related to the financial end, rather than to the construction end, of the improvement.

See

Aransas County v. *Coleman-Fulton Pasture Co.*, 108 Tex. 216, 191 S. W. 553.

The statute does not require that the petition shall designate the roads to be improved. In the present case the petition of the property owners did not designate the roads. In fact, the roads were not designated, either in the petition, or in the order defining the district and calling the election, or in the notice of election. The designation was made by the County Commissioners Court by a separate and independent order, which showed that the designation which was made by them, was made upon an interpretation of public sentiment of the Dis-

trict. It refers to the fact that the roads designated are the roads desired by the petitions and by "a large majority of the resident citizens and qualified voters." In other words, the County Commissioners Court, in the exercise of its discretion, designated the roads, using as a basis its interpretation of the expressed will of the voters. The roads so selected were the main traveled highways in the territory. The primary importance of the two trails is shown by the fact that both were State highways and one a Federal aid project. It is natural that these highways should be the highways favored by a majority of the voters.

The order designating the highways was a mere exercise of the discretion of the County Commissioners Court, although it may have been made at the time when the order was entered defining the district and calling the election.

See,

Limestone County v. *Garrett*, (Tex.) 236 S. W. 970;

Black v. *Strength*, 112 Tex. 188, 246 S. W. 79;

Grayson County v. *Harrell* (Tex. Civ. App.), 202 S. W. 160;

Wright v. *Allen* (Tex. Civ. App.), 257 S. W. 980;

Cannon v. *McComb* (Tex. Civ. App.), 268 S. W. 999;

Adams v. *Mullen* (Tex. Civ. App.), 244 S. W. 1083.

Under the case of *League* v. *Brazoria County Road District No. 13* (Tex. Civ. App.), 187 S. W. 1012

> "The determination of the area of the district, the sufficiency of the petition, and other prerequisites to the establishment of a valid road district was a matter peculiarly committed to the commissioners court."

This is inconsistent with the idea that the County Commissioners Court was obliged to accept the definition of the territory as contained in the petition of the taxpaying voters. Any idea that such definition is binding upon the Commissioners Court is doubtless caused by the fact that it is mandatory upon the County Commissioners Court to act upon the petition, although it need not accept the boundaries. With very rare exception, the boundaries fixed by the petition will be generally acceptable and out of the fact that action of the Commissioners Court is mandatory has probably grown the idea that such mandatory duty to act includes the obligation to accept the boundaries as presented in the petition.

But the Supreme Court of the United States has held that the boundaries of the district cannot be arbitrarily framed to subject property to unreasonable taxation.

See,

Kansas City Southern Ry. v. *Road District,* 266 U. S. 379,

and other cases, and the Commissioners Court was obliged to see that the boundaries did not conflict with this rule. In the present case, there can surely be no question as to the propriety of the boundaries. A territory consisting of approximately five hundred square miles, constituting the northerly half of a county thirty miles each way, was set apart and defined.

The cases cited by the plaintiffs and appellants herein do not apply. The discussion in these cases was merely incident to the questions before the Court, and in neither case was this matter at issue.

In *Huggins* v. *Vaden,* 253 S. W. 877, S. W. 204, two petitions were presented by conflicting districts, and the decision nowhere denies that the Commissioners Court had a discretion as between the two petitions.

Similarly, in *Meurer* v. *Hooper* (Tex. Civ. App.), 271 S. W. 172, two districts were proposed and the action of the Commissioners Court was practically sustained on the basis that the solution of the problem was within the discretion of the Commissioners Court. The authorities cited by the appellants, therefore, support the view that the boundaries are subject to the judgment and discretion of the County Commissioners Court.

When the bonds have been sold, the proceeds are to be applied and disbursed by the Commissioners Court on such roads as the Court may in its discretion select. This discretion may be exercised either before or after the election, but as an exercise, it is always the discretion of the Court and not the selection of the petitioners. The fund raised by the sale of the bonds is a corporate asset of the district and is subject to a judgment for damages for breach of contract.

See

Horn v. *Matagorda County* (Tex.), 213 S. W. 934.

The bonds must be paid whether the improvements are constructed or not.

See

Road District No. 4 v. *Home Bank & Trust Co.*, 5 Fed. (2d) 625.

The tax is to be collected as provided by law for the assessment and collection of school district special local taxes. These taxes are taxes that are voted by school district voters. The taxes so voted are for ordinary maintenance, as well as for the construction of improvements. They are levied and collected on real and personal property in the school district in the same manner as State and county taxes.

This tax in its nature is a general tax. It was authorized by a constitutional amendment which dealt with the financial aspect of the transaction, rather than the construction of the improvement. It was intended to be the security for an issue of bonds to be sold on the markets. It is the same kind of tax that is authorized by other Articles of the Texas Constitution.

See

Texas Const., Art. 8, secs. 1, 9; Art. 11, secs. 4, 5, 6, 7.

The Supreme Court of Texas has sustained the issuance of bonds secured by a tax which on its face is a general tax.

See

Simmons v. *Lightfoot*, 105 Tex. 212, 146 S. W. 871;

Munson v. *Looney*, 107 Tex. 263;

Harris County Drainage Dist. v. *Park* (Tex. Civ. App.), 148 S. W. 351;

Wharton County Drainage Dist. v. *Higbee*, 149 S. W. 385;
Robbins v. *Limestone County* (Tex)., 268 S. W. 915.

The debt is created under the constitutional amendment and statute to raise money to improve a rural highway. These highways are part of the general highway system of the State. A tax for this purpose has not usually been levied on the basis of benefit. The benefit to the lands is not usually special and peculiar. It is of the same nature in the case of property on or close to the highway as in the case of property at a distance from it, the only difference being that a person on or close to the highway can more easily reach the improved highway than the person at a distance from it. The difference in this respect from drainage, irrigation and street assessments which have a direct and immediate effect upon the lands is obvious. In the two former, water is taken from or placed upon the lands assessed. In the street improvements, the lands are made available for residence purposes, an opportunity is given to construct water and sewers and introduce a lighting system. In either case, the lands immediately adjacent to the improvement are directly and measurably benefited. In the case of highway improvements, the residents of the community at large, not the adjacent landowners, are generally benefited. We respectfully submit for these reasons that the tax is a general tax and not a special assessment.

The Court, we respectfully submit, has erred in saying that the creation of this district will prevent further improvement. The bonds in this case are serial bonds, the instalments available for re-

tirement beginning at $5,000 per year. Consequently, the amount of the debt will be reduced in each year. So, too, it is to be presumed that the assessed value of the taxable real property will increase from year to year. By both processes additional borrowing power is created. The assessed value of the real property of the district is $2,800,000. (See Tr., fol. 50). If there be no other debt for any of the purposes mentioned in section 52 of Article 3 of the Constitution, as amended, this district might issue bonds to the amount of $700,000; the present proposed issue is only $300,000. Therefore, further issues may be made to the amount of $400,000, if there be no other debt chargeable against the debt limit. Plaintiffs may, if they see fit, petition that the district issue bonds to improve the highways immediately adjacent to their lands. Thereupon, it will be the duty of the County Commissioners Court to receive the petition and to act upon it, and, if regular, to order an election. The designation of the highways may be approved or may not be approved by the County Commissioners, as the public interests require. The public interests always control.

The tax authorized by the statute for the payment of road bonds is a general tax. The Supreme Court of Texas has said that the constitutional amendment was adopted for the purpose of conferring larger and wider powers of raising money. The tax which is provided by the statute is intended to be a tax for the payment of money so raised by loan upon a bond issue. The money that is to be raised by tax is for the payment of the corporate debts of the district, and not to effect any particular improvement. The improvement is within the discretion of the County Commissioners

Court, and that court, if it performs its duty, can select the highways most to the public interest. Hence, every element of special assessment is absent. There is no peculiarity in the improvement, there is no peculiar benefit to the property, and the money is to be applied not in the improvement itself, but in the payment of corporate debts and liabilities.

The fact that the authority conferred was intended to be exercised by an issue of negotiable bonds, may properly be considered in construing the statute.

See

United States v. *Clark County,* 96 U. S. 211;

Gunnison County Commissioners v. *Rollins,* 170 U. S. 255, 275;

Denver v. *Home Savings Bank,* 236 U. S. 101, 104.

If the authority conferred had provided for a special assessment according to benefits, and not a tax *ad valorem* based upon the State and County assessment, the marketability of the securities would have been seriously affected, and the district would not have been able to borrow money on satisfactory terms. It would have imposed an additional burden upon the property owners if they sought to exercise the authority conferred by the

The tax which is authorized is as we have shown of the same general character as other taxes authorized and required to be levied for the payment of debts and liabilities.

We therefore respectfully submit that the statute does not provide for a specified improvement on a designated road; that the authority conferred

on the district is continuing, and will permit the improvement of all the roads in the district, including those in which the plaintiffs are directly interested, so long as the debt created is within the constitutional limit.

II.

The decisions outside of Texas have treated road district taxes as general taxes and have held that they are not special assessments.

In *Cooley on Taxation*, (4th Ed.), vol. 1, section 31, p. 106, the differences between a special assessment and a tax are stated. The tax in the present case does not contain any of the peculiar features which distinguish a special assessment. It is not levied on land but on the contrary, it is levied on both real and personal property. The personal liability is not on the basis of a special assessment, but on the basis of ordinary county taxes. It is not based wholly on benefit, and it is not exceptional either as to time or locality. It extends throughout the taxing district and an annual levy must be made in each year, whilst the bonds are out. The benefit to the tax payer is implied in all tax levies, but in the case of a general tax strictly so-called, the benefit is one which is general to the community. In the case of a special assessment, the benefit is one which is special and peculiar to the property owners. Mr. Justice BROWN in *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 203, treats "roads" as one of the public conveniences in which the taxpayer shares. He says that he is liable to a road tax "though he never use the road."

To the effect that road taxes in rural territory are not special assessments, see

People v. *Whyler*, 41 Cal. 351;
Shoshone Highway Dist. v. *Anderson*, 22 Idaho, 109, 125 Pac. 219;
Hopkins v. *Special Road & Bridge Dist. No. 4*, 73 Fla. 247, 74 So. 310;
Charlotte Harbor & N. R. Co. v. *Welles*, 78 Fla. 227, 82 So. 770; s. c. 260 U. S. 8;
Griggsby Const. Co. v. *Freeman*, 108 La. 435, 32 So. 399;
Wight v. *Police Jury*, 264 Fed. 705;
Maltby v. *Tautges*, 50 Minn. 248; 52 N. W. 858;
Gulf & S. I. R. Co. v. *Ducksworth*, 286 Fed. 645;
Reed v. *Howerton Engineering Co.*, 188 N. Car. c. 39, 123 S. E. 749;
Miller v. *Hixson*, 64 Ohio St. 49, 50;
Howes v. *Racine*, 21 Wis. 514;
Hale v. *Kenosha*, 29 Wis. 599.

We respectfully call the attention of the Court to the case of *In re Bonds of Orosi Public Utility Dist.*, (Cal.), 235 Pac. 1004, where the Court considered the question whether a water tax in rural territory was a special assessment. It held that it was not.

We also respectfully refer the Court to those cases which hold that a rural highway is not a local improvement and consequently cannot be made the basis of a special assessment.

See,

Graham v. *Conger,* 85 Ky. 582;
Conger v. *Bergman,* (Ky.), 11 S. W. 84;
Conger v. *Graham,* (Ky.), 11 S. W. 467;
Sperry v. *Flygare,* 80 Minn. 325;
In re Washington Ave., 89 Pa. St. 352.

In States where a rural highway is not a local improvement, the only tax which can be levied therefor is a general tax. A special assessment cannot be levied. In those States what is the tax which was levied in the present case? Is it a tax or a special assessment? The decision of the Supreme Court asserts that it is a special assessment, but the decisions of the State Courts say that no special assessment can be levied therefor.

III.

Road District No. 2 of Archer County has been created as a public and quasi-municipal corporation with the power to levy general *ad valorem* taxes to pay its corporate debts and liabilities, and no Federal question is involved.

We have referred above to the nature of the tax which has been levied in this case. Section 637 of the General Revised Civil Statutes 1911, declares that a road district accepting the benefits of the statute is a body corporate. It is within the power and discretion of the Legislature of Texas to create the district into a body corporate of a quasi-municipal character. The creation of such a corporation does not violate any provision of the Federal Constitution.

See,

Kelly v. *Pittsburgh*, 104 U. S. 78;
Forsyth v. *Hammond*, 166 U. S. 506;
Claiborne County v. *Brooks*, 111 U. S. 400;
McCain v. *Des Moines*, 174 U. S. 168;
Hunter v. *Pittsburgh*, 207 U. S. 161.

Mr. Justice BRANDEIS in *Missouri Pacific R. Co.* v. *Road Dist.*, 266 U. S. 187, 190, said:

> "Road building is a public purpose which may be effected by general taxation. * * * The Fourteenth Amendment does not require that taxes laid for this purpose shall be according to the benefits to be received by the person or thing taxed."

The tax which is levied is of the same character that would be implied if the power to create the debt were conferred without any specification of the means of meeting it. That such a power implies the authority to levy a tax,

See,

United States v. *New Orleans*, 98 U. S. 381, 393;
Ralls County v. *United States*, 105 U. S. 733;
Breckenridge County v. *McCracken*, 61 Fed. 191;
United States v. *Saunders*, 124 Fed. 124, 128.

Finally, we respectfully submit that in a case of doubt, the Court should adopt that construction which will sustain the constitutionality of the Act.

Arkansas Gas Co. v. *Railroad Commission*, 261 U. S. 379;

Utah Mines v. *Beaver County*, 262 U. S. 325;
Texas v. *Eastern Texas R. Co.*, 258 U. S. 204;
Adkins v. *Children's Hospital*, 261 U. S. 525;
Everard's Breweries v. *Day*, 265 U. S. 545.

The meaning of the statute of a State and the rules of a State affecting property within the State, are peculiarly questions of local law to be ascertained and established by the State Courts.

Hines Trustees v. *Martin*, 268 U. S. 458;
Douglas v. *Noble*, 261 U. S. 165;
Yeiser v. *Dysart*, 267 U. S. 520, 541.

Under these decisions we submit that any doubt as to the constitutionality of the act should have been resolved in favor of the validity thereof.

IV.

The evidence does not establish that Archer County Road District No. 2 was arbitrarily created or that the definition of its boundaries was a plain abuse of statutory authority.

We have heretofore pointed out that Road District No. 2 contains approximately one-half of Archer County, the northerly half. In so defining it, no arbitrary boundaries were drawn, nor is there any evidence any where in the record, that the plaintiffs' property was brought within the District for the purpose of contributing to the levy without

participating in the improvement. So far as the testimony in the case goes, the benefit is general and applies equally to all lands in the District.

Rural improvements of this character are the subject of local discussion for months in advance. Such was the case here. Representatives of each section of the County desired improvements immediately adjacent to their lands. The Commissioners were confronted with the necessity of acting for the benefit of the community as a whole. In so doing, they designated important State and National highways as the objects to be improved from the funds to be collected. In so doing, they took into consideration the future growth of the County, its natural market outlet in the City of Wichita Falls, and other economic factors which could be important only to the District as a whole.

The Commissioners desired the participation of the entire County in this general improvement (Tr., fol. 74). Local cliques prevented the attainment of this object. The designation of the northern half of the County was a reasonable compromise effective to secure the general benefit. In this it is submitted that the plaintiffs have not been unreasonably prejudiced.

The plaintiffs frankly admit that their objective is improved roads of their own choosing,—the present plan contemplates roads selected with the general public welfare in view. In this, the plaintiffs are not consistent. They seek to enjoin the defendants from acting for the public benefit, because they have ignored the plaintiffs' prayer for special benefit to the plaintiffs.

The sentiment of property taxpaying voters of the District was strongly in favor of the public benefit and opposed to the selfish object of the plaintiffs,

as witnessed in the casting of three hundred and three out of four hundred and five votes in favor of this issue.

It is respectfully submitted that there is no room in the present case for the argument that the District has been selected with palpably arbitrary boundaries in such a way as to contravene the provisions of the Fourteenth Amendment.

CONCLUSION.

Your petitioners respectfully pray that a rehearing be granted in this case, and that upon the rehearing the Court make such decree as the premises require.

Respectfully submitted,

E. M. HOOPER,
E. A. MCDONALD,
A. L. BISHOP,
E. A. HERNDON,
HENRY MUNCHRATH.

JOHN R. MOORE,
W. E. FORGY,
Of Counsel.

The undersigned respectfully certify that they believe that it is proper that a rehearing should be granted in this cause and that the application therefor is made in good faith and not for delay.

JOHN R. MOORE,
W. E. FORGY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 256.—October Term, 1925.

Perry Browning et al., Appellants, *vs.* E. M. Hooper et al.	Appeal from the United States District Court for the Northern District of Texas.

[January 4, 1926.]

Mr. Justice Butler delivered the opinion of the Court.

Appellants own taxable real and personal property in that part of Archer County, Texas, defined as Road District No. 2. The appellees are the county judge and four commissioners, (constituting the county commissioners' court) the tax assessor and the sheriff of the county, who is the tax collector. Appellants brought this suit to restrain the issue or sale of bonds of the road district in the amount of $300,000 proposed to be sold to obtain money for the construction, operation, and maintenance of roads in that district, and to restrain the levy or collection of any tax upon their property to pay any part of the interest or principal of the bonds. They seek relief on the ground that the creation of the road district and the enforcement of the proposed tax, will deprive them of their property without due process of law in violation of the Fourteenth Amendment. The District Court dismissed the complaint. 3 F. (2d) 160. The case is here on direct appeal. § 238, Judicial Code.

The Texas statutes (Vernon's Complete Texas Statutes, 1920) provide: "Any county . . . or any political subdivision or defined district, now or hereafter to be described and defined, of a county," is authorized to issue bonds, not to exceed one-fourth of the assessed valuation of real property in the district, for the construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, and to levy and collect taxes to pay them. Art. 627. Upon the petition of 50 resident property taxpaying voters of any defined district of any county, it is the duty of the commissioners' court to order an election in the district as described

in the petition to determine whether its bonds shall be issued for such road purposes, and whether a tax shall be levied upon the property of the district for their payment. Art. 628. If two-thirds of the votes cast are in favor of the proposition, the commissioners' court is required to issue and sell the bonds. Art. 631. But before they are put on the market, the court is required to levy a tax sufficient to pay the debt as it matures. The assessments are to be made on the same valuation, and they become liens and may be enforced in the same manner as state and county taxes. Arts. 634, 2827, 2836. For the purposes of the act, any district accepting its provisions by such vote is thereby created a body corporate which may sue and be sued. Art. 637.

Archer County is about 30 miles square, and has a population of between 5000 and 6000. The principal place is Archer City, the county seat, located about five miles south and three miles east of the center of the county. Road District No. 2 embraces approximately the northerly half of the county, including a part of Archer City. The Ozark Trail is a federal aided state highway, and about 20 miles of it extends diagonally across the northwesterly part. Dundee is located on it about two miles from the west line of the county. There is a highway extending from that place to Diversion Dam about six miles northwest. About 18 miles of the Southwest Trail lies between Archer City and a point on the north line of the county about six miles from its northeast corner. There is another highway extending from a point on the Southwest Trail about two miles south of the county line to Holliday on the Ozark Trail about six miles west. These roads are within the road district, and the bonds issued are to raise money to improve them.

January 17, 1924, there was presented to the commissioners' court a petition signed by 74 persons. It prayed an election to determine whether bonds of the territory, therein described by metes and bounds, and to be designated as "Road District No. 2 of Archer County, Texas", should be issued for road purposes in the amount of $300,000; and whether a tax should be levied upon the property therein to pay the bonds. The commissioners' court by order established the district within the metes and bounds and for the purposes set forth in the petition, and declared it to be a body corporate. On the same day the court fixed the time and place for an election. Its result was 303 votes for and 102 against the

bond issue. Thereupon the court ordered the bonds to be issued, and levied the taxes. Before the election was called, the court determined that the proceeds of the bonds, if voted, or so much as might be necessary, should be expended for the roads above described.

The appellants' lands—24,900 acres in all—are in the northeasterly part of the county. All but one of the petitioners are residents of the part of Archer City that is within the road district. Archer City, Dundee and Holliday, furnished 252 votes for the bond issue,—more than twice the number cast against it. Nearly all the votes cast in the northeasterly part of the county were negative. The taxable property in the district is assessed at $5,683,359, of which $257,080 belongs to appellants, and $111,388 to petitioners; and $60,500 of that amount belongs to one signer, leaving only $50,888 to the other 73. The part of the district in which appellants' lands are situated is tributary to Wichita Falls, which is outside Archer County, but near its northeast corner. The evidence persuasively supports appellants' contention that the improvements of the roads designated will not benefit their property. Moreover, the inclusion of their lands in that road district makes it impossible until the last bonds mature 30 years hence, to create another road district to raise money for the improvement of roads needed to serve the territory in which their lands are situated. Art. 637d.

Resort may be had to general taxes and to special assessments to raise funds for the construction or improvement of roads. *Missouri Pacific Railroad* v. *Road District*, 266 U. S. 187, 190. The proceedings in this case cannot be sustained as the levy of a general tax. The commissioners' court is authorized to levy general taxes for road purposes up to a stated maximum on each $100 valuation. Art. 2242; Constitution Art. VIII, § 9. The expenditure of the moneys so raised is not limited to any specified roads. And it is significant that, in the case of a road district, the court's duties in respect of the amount to be raised and the lands to be subjected to the charge are purely ministerial, and confined solely to carrying out the will of the petitioners when approved at the election. Here, on the initiation of individuals signing the petition, a special district was carved out to furnish credit and to pay for specified improvements on designated roads wholly within the territory selected. The purpose was special, and the district will

cease to exist as a body corporate upon the payment of the bond debt. It is clear that the burdens here sought to be imposed on appellants' lands are special assessments for local improvements. *Embree* v. *Kansas City Road District*, 240 U. S. 242, 247; *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190, 197, 209.

The legislature did not create the road district, levy the tax or fix the amount to be raised. Under the act, road districts are not required to correspond with or to include any political subdivision. *Moore* v. *Commissioners' Court*, (Tex. Civ. App.) 175 S. W. 849; *Bell County* v. *Hines*, (Tex. Civ. App.) 219 S. W. 556. There is nothing in the law to guide or to limit the action of the signers of the petition in selecting property to be assessed. Subject to the vote of a district of their own choice, the petitioners' designation is absolute. The commissioners' court has no power to modify or deny; it is bound to grant the petition. *Huggins* v. *Vaden*, (Tex. Civ. App.) 253 S. W. 877, 878; 259 S. W. 204, 206; *Meurer* v. *Hooper*, (Tex. Civ. App.) 271 S. W. 172, 176. And when the required vote is given, the court, once for all, must make a levy on the taxable property of the district sufficient to pay the entire debt as it matures. The opinion of the District Court states that the road district "was composed of two of the precincts of Archer County—'political subdivisions' of the county well recognized and ascertained long before the controversy." We find nothing in the record to support the statement. But, if true, it does not tend to show that the legislature created the road district. A political subdivision is not a "defined district" within the meaning of the Texas Constitution (Art. III, § 52) or of the act. It has been held by the Texas Court of Civil Appeals that a "defined district" means a defined area in a county, and less than a county, other than a political subdivision of a county. *Bell County* v. *Hines, supra*, 557. The fact that the metes and bounds describing the road district happened to coincide with the external boundaries of two adjoining commissioners' precincts does not support the contention that the road district was created by the legislature. For the election of commissioners, each county is divided into four precincts, from each of which a commissioner is elected. These precincts are not defined by the legislature, but by the commissioners' courts. Art. 1356; Constitution, Art. V, § 18. They are political subdivisions, but, unlike road districts, they are not bodies corporate. See *Ex parte Haney*, 51 Tex. Cr. Rep. 634; *Cofield* v.

Britton, (Tex. Civ. App.) 109 S. W. 493, 496. They are not taxing or assessment districts; their powers and functions are wholly different from those of a road district. And plainly, the authority granted (Art. 627) to issue road bonds up to one-fourth the assessed valuation and to levy taxes ratably to pay them is not a legislative determination of the rate or amount of the tax imposed on appellants' property. The amount of the bonds to be issued and the property to be taxed are the elements which determine the burden. These were fixed by the petition and election. The legislature may make assessments for local improvements ratably on the basis of property valuation (*Valley Farms Co.* v. *Westchester,* 261 U. S. 155); but, where the amount to be raised is determined and the property to be assessed is selected as in this case, the requirement that the burden shall be so spread is not a legislative assessment.

Where a local improvement territory is selected, and the burden is spread by the legislature or by a municipality to which the State has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits. *Valley Farms Co.* v. *Westchester, supra; Hancock* v. *Muskogee,* 250 U. S. 454, 459; *Withnell* v. *Construction Co.,* 249 U. S. 63, 69; *Wight* v. *Police Jury,* 264 Fed. 705. But it is essential to due process of law that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the legislature, and there has been no legislative determination that their property will be benefited by the local improvement. Appellants were denied all opportunity to be heard. No officer or tribunal was empowered by the law of the State to hear them, or to consider and determine whether the road improvements in question would benefit their lands. The act is repugnant to the due process clause of the Fourteenth Amendment. *Embree* v. *Kansas City Road District, supra,* 251.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.